

SAN FRANCISCO PUBLIC LIBRARY



3 1223 00618 9527

BOOK NO.

923.4 P547 A

ACCESSION

251288



SAN FRANCISCO PUBLIC LIBRARY



3 1223 00618 9527

DATE DUE

SFPL DEC 1 - 1984

SFPL APR - 9 '86

201-6503

Printed
in USA

THREE CRIMINAL LAW REFORMERS

BECCARIA, BENTHAM,
ROMILLY

BY

COLEMAN PHILLIPSON

M.A., LL.D., Litt.D.

*Of the Inner Temple, Barrister-at-Law
Professor of Law, University of Adelaide*



LONDON AND TORONTO
J. M. DENT & SONS LTD.
NEW YORK: E. P. DUTTON & CO.

1923

All rights reserved

923.4
P547 A

251288

PRINTED IN GREAT BRITAIN

3 1223 00618 9527

DEDICATED

TO

SIR COURTENAY ILBERT, G.C.B., K.C.S.I., C.I.E.

PREFACE

THE following three essays are not intended to be considered as separate, independent studies; they are meant to be taken together as supplementing each other, and as constituting one whole. With this intention in view, the author has been able to avoid a good deal of overlapping and repetition, which would otherwise have been inevitable.

Though three men and their works are here discussed, we are concerned with but one epoch, one movement, one phase in legal evolution, which represents in many respects a turning-point in European history, and is of the utmost importance in the development of our modern civilisation. Beccaria, Bentham and Romilly are among the greatest law reformers of modern times. In their assault on the folly, injustice and cruelty of the then existing criminal jurisprudence, in their trenchant criticism of outworn codes, obscurantist traditions, blind superstitions, dogmatic technicalities, oppressive fictions, and useless relics of the past, in their proposal of rational substitutes, in their pointing the way to the light, they were intimately united. Their resemblances, like their differences, are as striking in their work as they are in their personal characteristics. In the case of Beccaria—a diffident Italian youth, shrinking from the struggles of men, whose small work was almost forcibly extracted from him by his friends, and whose guarded oracular utterances soon arrested the attention of the world—we shall see vital conceptions and principles of penology in the process of germination and crystallisation; we shall see them in their triumphant conflict with the prevailing régime of sanguinary laws and barbarous methods of procedure. In the case of Bentham—that myriad-minded man, the dauntless explorer of institutions, the arch-legislator ever ready, in his jealously guarded “hermitage,” to make laws for all the nations of the earth—we shall see a prodigious multitude of ideas, schemes and systems, lavishly given to the world from a rich mine that could, surely, never be exhausted; we shall see this prolific progenitor scattering them broadcast, infusing new life into many barren places, raising

the hopes of peoples that were worn out with despair, and leaving his successors a legacy, which, despite the numerous borrowings from it of several generations, still possesses valuable treasures. In the case of Romilly—that true and saintly soul, that man of noble disinterestedness and self-abnegation, of unsullied purity and scrupulous rectitude, that man of Promethean courage animated by an ardent love for his fellow-creatures—we shall see those ideas and projects brought before a legislature; we shall see him advocating them with ceaseless energy and untiring perseverance, and eloquently pleading the cause of reason and humanity; we shall see the adventures encountered by those ideas and projects in the presence of the legislature which, confronted with innovations that were deemed contrary to ancestral wisdom, showed itself now timorous, now obstinate, now panic-stricken, now furiously hostile.

It will be perceived, then, that these three men, chosen as representative protagonists in the movement, are closely related to each other by a connecting link, which is not merely historical, but clearly doctrinal, organic. Indeed, Bentham explicitly proclaimed his indebtedness to Beccaria, and Romilly similarly acknowledged his to both Beccaria and Bentham.

Now, they were all three—and this is another point of affinity—in touch with France, and with the French philosophical and political movement—they were all three indebted to the doctrines of French thinkers of the time. Accordingly something is said here of men such as Montesquieu and Voltaire, Helvétius, Diderot, and some of the other Encyclopædists, in order to show the kinship that was so frequently avowed.

There is no need to explain the method of arrangement and of exposition adopted in this book. A reference to the analytical contents, and a glance at the book itself, will perhaps indicate it satisfactorily. The writer may say, however, that he has endeavoured throughout to express himself with brevity and precision, to avoid sketchiness and irrelevant details, and to harmonise the various parts of the work so as to give due emphasis to each, and bring out the significance of the whole.

COLEMAN PHILLIPSON.

[NOTE.—It is well to add that the whole book, including even the preface, was completed in July, 1914; but its publication was delayed owing to the war and to other causes.—*University of Adelaide, June 1, 1923.*]

CONTENTS

	PAGE
PREFACE	vii
REFERENCES	xv

PART I

CESARE BECCARIA (1738-1794)

CHAPTER I.—*Life.*

At a college in Parma	3
Early studies	3
Marriage	4
Circle of friends—the brothers Verri	5
Publication on the currency	6
The <i>Caffè</i> —Beccaria's contributions	7
Publishes the <i>Dei Delitti</i> (1764)	9
Attacks on the work—reply by the Verris	12
Journey to Paris—the Encyclopædists	15
Breach with the Verris	19
Appointed professor of political economy	21
Death of his wife—marries again	22
Various offices occupied—death	22
Personal characteristics	22
Character of his work—style	25

CHAPTER II.—*Nature of the Age in which Beccaria lived. Formative influences on him.*

The seventeenth and eighteenth centuries in Europe; in Italy	27
Conditions as to criminal law and administration	30
Prevalence of torture	32
Despair of reform	36
French influence	38
Montesquieu	39
The Encyclopædists—their object, work and influence	41
The Encyclopædists and criminal law	47
Voltaire—relation to Beccaria	50

CHAPTER III.—*Analysis of Beccaria's "Dei Delitti."*

(i) Measure of crimes and punishments	56
Sanctions	57
Motives	58
Certainty of the law	58
Intention and consequence	59
Object of punishment	59
Proportion of punishment to offence	59
(ii) Certainty of punishment—pardon	61
Promptness	61
Place of punishment	62
Principle of prescription	63
(iii) Nature and division of crimes, and relative punishments	64
High treason	65
Offences against honour	65
Offences against property	65
Offences against public peace	67
Suicide—infanticide	67

CHAPTER III.—*continued*

	PAGE
(iv) Some punishments considered	68
Banishment	68
The capital penalty	69
(v) Procedure—secret accusations—torture	74
Proofs—evidence	75
The inquisitorial procedure	78
Torture	78
(vi) Prevention of crime	80
Conclusion	82

CHAPTER IV.—*Beccaria's Influence and Achievements.*

Great vogue of the <i>Dei Delitti</i>	83
Relationship to the reform movement	85
Influence of Voltaire—foreign sovereigns	86
Foreign influence of the Encyclopædists	87
Legal writings	89
On the Continent	89
In England	90
Public societies and academies	92
Action of States	92
Austria	93
Italy	93
France	95
Russia	98
United States	99
Characteristics of the <i>Dei Delitti</i> —certain errors	99
Position of Beccaria—vital principles	104

PART II

JEREMY BENTHAM (1748–1832)

CHAPTER I.—*Life and Literary Activity.*

Early life	109
Westminster School	110
At Oxford—M.A.	111
Called to the bar—aversion from practice	113
Begins writing—finds his vocation	114
<i>Critical Elements of Jurisprudence</i>	117
<i>Fragment on Government</i>	118
<i>Rationale of Punishments and Rewards</i>	120
At Lord Lansdowne's	120
Sentimental interlude	122
<i>Introduction to the Principles of Morals and Legislation</i>	122
<i>Defence of Usury</i>	123
Meets Romilly and Dumont	124
Interest in French affairs	125
<i>Anarchical Fallacies</i>	125
Death of his father—Bentham at Queen's Square Place	127
The Panopticon scheme	127
<i>Truth v. Ashhurst.</i>	131
Bentham made a French citizen	131
<i>Protest against Law Taxes</i>	132
<i>Supply without Burden</i>	133
The poor-law	133
<i>Traité de législation</i>	135
Law of libel	137
Parliamentary reform	137

CONTENTS

xi

	PAGE
Educational and religious controversies	138
<i>Codification Proposal</i>	140
<i>Constitutional Code</i>	143
Other works	145
Death—will	146
Personal characteristics	147
CHAPTER II.—<i>Nature of the Age in which Bentham lived. His Relationship thereto.</i>	
(i) General conditions	152
Characteristics of the eighteenth century	152
Utilitarianism, individualism, philanthropy	154
Philosophic doctrine and political opinion	157
Effect of the French Revolution	160
(ii) Crime and criminal law	164
Amount of crime, and causes	164
Defects of the criminal law	166
No consistency, harmony, or method	168
Multiplication of capital offences	170
Kinds of punishments	171
Scandal of public executions	172
Kinds of prisons—their condition	173
Transportation	174
The hulks	175
Attempts at amelioration—Howard—Burke	176
CHAPTER III.—<i>Bentham's Fundamental Doctrines. Relation of Criminal Law to the Principle of Utility. Bentham's Aim and Method.</i>	
(i) Ethics—utilitarian basis	180
The greatest happiness principle	180
Sanctions, motives, intention	182
(ii) Politics and government	183
The State and the individual	183
Position of the majority	184
(iii) Civil law	185
Legislation—an empirical science	185
Bentham's attack on technicalities and abuses	186
Imprisonment for debt	187
Poor-law and the law of settlement	188
(iv) Criminal law	188
Writers on criminal law before Bentham	188
Bentham's attitude	189
Punishments and their selection	191
(v) Bentham's aim and method	192
Questioning spirit—innovation	192
Elaborate analysis—to get at the real	193
Experimental method	194
CHAPTER IV.—<i>Bentham's Views on Penal Law.</i>	
(i) Offences	196
Definition and classification	196
Effect of intention and motives on alarm	197
Preventability—its influence on alarm	197
Cases where alarm is absent	198
Grounds of justification	198
(ii) Remedies	198
Classification	198
Direct means of prevention	199
Satisfaction for offences—kinds	199
Pecuniary reparation	200

	PAGE
CHAPTER IV— <i>continued</i>	
(iii) Punishments	201
Definition	202
Object of punishment	202
Cases unmeet for punishment	202
Pardoning power	203
Proportion between penalties and offences	204
Necessary qualities of punishment	205
Kinds of penalties	207
Examination of some common penalties	208
Flogging	208
Branding	208
Infamy	208
The pillory	208
Banishment	208
Transportation	209
Imprisonment—the Panopticon penitentiary	210
Capital punishment	214
(iv) Indirect means of preventing offences	217
Direct and indirect legislation	217
Clear statement of the law	218
Influence of the law on power, knowledge, inclination	218
Changing the course of dangerous desires	220
Satisfaction of certain imperious desires	221
To strengthen the impression of punishment on the imagination	222
To facilitate knowledge of the fact of an offence	222
Cultivation of benevolence, honour, religion	224
National education	225
General precautions against abuses of authority	225
Means of diminishing the bad effects of offences	225
CHAPTER V.— <i>Bentham's Position, Achievements and Influence.</i>	
Great literary activity—wide sphere	227
Certain weaknesses of his work	228
His real achievements	229
Pioneer work—innovation—fight with prejudice	230
Destructive criticism	230
Constructive genius	231
Circle of disciples—reform movement	231
Triumph of Benthamism	232
Examples of Benthamite reforms	232
Benthamism followed by collectivism	234
Conclusion	234

PART III

SIR SAMUEL ROMILLY (1757-1818)

CHAPTER I.—*Life.*

Parentage	237
Early education	238
Projects for his career	239
His own studies	240
Articled to a solicitor	241
Friendship with Roget	241
Member of Gray's Inn	242
Contemplates the penal system	243

	PAGE
Travels on the Continent—meets Dumont, D'Alembert, Diderot, and others	243
His opinion of the French	245
Called to the bar—joins the Midland circuit	246
Relations with Mirabeau—with Lord Lansdowne	247
<i>Fragment on . . . juries</i>	248
<i>Observations on . . . "Thoughts on Executive Justice"</i>	250
Visit to Paris—letter on French prison life	250
<i>Thoughts on the probable influence of the French Revolution.</i>	251
Marriage	252
Takes silk—appointed Chancellor of the County Palatine of Durham	252
Is offered a seat in the House of Commons	253
Appointed solicitor-general in the Grenville ministry	254
M.P. for Queenborough	254
Attacks the slave trade	254
His bill to amend the bankruptcy laws	255
Bill as to freeholds and contract debts	255
Bill as to certain privileges of members of parliament	256
The Woolsack within his reach—his reflections	257
Is unseated on petition—buys representation of Wareham	259
Bills to amend the criminal law	259
Affairs of the Duke of York	261
Supports the liberty of the subject	262
Bill to abolish the death penalty for stealing	262
On the House of Commons' power of commitment	267
On the Acts for erecting penitentiaries	268
Delay in the hearing of causes	269
Penal clause in Poor Bills	269
Bill to abrogate capital punishment for vagrant soldiers	269
Opposes flogging in the Army	270
Bill as to charitable trusts	270
Favours removal of Catholic disabilities	270
Opposes creation of a Vice-Chancellor	270
The Bristol election—on duties of a member of parliament	270
Duke of Norfolk's offer—M.P. for Arundel	273
Bill as to high treason and corruption of blood	273
On insolvent debtors	275
Against embodiment of militia in time of peace	276
Continental tour	277
Vindicates the cause of persecuted Protestants in France	278
Bill as to excessive punishment of poachers	279
Opposes the Habeas Corpus Suspension Bill	279
Attacks the system of lotteries	280
On ministers declaring the law to magistrates	281
Thoughts on his foiled expectations	281
Article in the <i>Edinburgh Review</i> on Bentham	282
Opposes the Indemnity Bill	282
Head of the poll for Westminster	283
Death of his wife—his suicide	285

CHAPTER II.—*Romilly's Principles of Criminal Law, and Views as to its Reform.*

Relation to Bentham	286
Paley's views on criminal law	287
Madan's tract—its influence	288
(i) Rigorous character of the existing law—consequences	291
Confusion and inconsistency	291
The sanguinary law cannot be executed	291
Vain threat of the death penalty	292
Injured parties refuse to prosecute	293

CHAPTER II— <i>continued</i>	PAGE
Witnesses decline to give evidence	293
Perjury of juries	293
Different practices of judges	294
(ii) Necessity of reform	295
"Wisdom of our ancestors" and our criminal jurisprudence	295
Many rigorous measures not part of the common law.	296
Nature of the earlier English code	296
(iii) Object and character of punishment	297
Division of penalties	297
Object of the legislature	298
Excessive punishment and deterrence	298
Proportion of penalty to offence	298
Exemplary character	299
Certainty of application	299
The law to be made known	300
No deviation from the announced law	300
Discretion of judges	300
Power of judges to remit punishment	301
Criticism of Paley	302
(iv) Some crimes and penalties considered	306
Imprisonment for debt	306
The death penalty	307
High treason—embowelling and quartering	308
Corruption of blood	309
Corporal punishment	310
(v) Administration of justice. Procedure. Jurisdiction	312
Nature of evidence	312
Accused persons to give evidence	313
Grand juries	313
Powers of justices	313
Costs of prosecutors and witnesses	314
Overlapping jurisdictions	314
(vi) Condition of prisons and prisoners	315
Preparation of judicial statistics	315
Transportation	315
The hulks	315
Penitentiary houses	315
The common gaols	317
(vii) Preventive measures	317
 CHAPTER III.— <i>Romilly's Personal Characteristics and Position.</i>	
His death a great loss to his contemporaries	320
Assemblage of qualities	321
Simplicity and reserve	321
Self-communing	321
Sincerity and disinterestedness	322
Not a courtier or office-seeker	323
Attitude with regard to his electors	325
As a lawyer	326
His speeches—expression and manner	327
As a politician and parliamentarian	328
Union of English and French qualities	330
Shade in the picture	331
His achievements	331
 INDEX	333

REFERENCES

(Various other references not put in this list are given in the course of the work.)

- A. Andrews, *The Eighteenth Century* (London, 1856).
 C. M. Atkinson, *Jeremy Bentham: his Life and Work* (London, 1905). See also Dumont.
 Jeremy Bentham, *Works*, 11 vols. Ed. by Sir John Bowring (Edinburgh, 1843). See also Dumont.
 A. Birrell, *Miscellanies* (London, 1902), "The House of Commons," p. 228.
 Sir W. Blackstone, *Commentaries on the Laws of England*, 4 vols. (first edition, 1765-9).
 J. Boswell, *Life of Johnson*, ed. G. B. Hill (Oxford, 1887).
 E. Bouvy, *Voltaire et l'Italie* (Paris, 1898).
 Lord Brougham, *Historical Sketches of Statesmen who flourished in the time of George III* (London, 1839).
 E. Burke, *Speech at Bristol previous to the Election* (1780).
 J. H. Burton, *Benthamiana* (Edinburgh, 1843).
 C. Cantù, *Beccaria e il diritto penale* (Firenze, 1862). French translation, with introduction and notes: *Beccaria et le droit pénal*. Par J. Lacointa et C. Delpech (Paris, 1885).
 C. Casati (Ed.) *Lettere e scritti di Pietro e di Alessandro Verri*, 4 vols. (Milano, 1879-1881).
 Sir W. J. Collins, *The Life and Work of Sir Samuel Romilly* (London, 1908). (Reprinted from the "Transactions of the Huguenot Society," 1908.)
 P. Colquhoun, *Treatise on the Police of the Metropolis* (London, 1795). Sixth edition, 1800.
 J. W. Croker, *Correspondence and Diaries* (1884), vol. iii.
 A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*. (London, 1914).
 D. Diderot, *Œuvres complètes*, 20 vols. (Paris, 1875); vol. iv, pp. 52-60.
 L. Ducros, *Les Encyclopédistes* (Paris, 1900).
 E. Dumont, *Traité de législation*, 3 vols. (Paris, 1802). Trans. by R. Hildreth (London, 1891); and C. M. Atkinson (Oxford University Press, 1914). See also Bowring's edition of Bentham's *Works*, vol. i.
 W. Eden, *Principles of Penal Law* (London, 1771).
 J. Fabre, *Les Pères de la Révolution* (Paris, 1910).
 J. A. Farrer, *Crimes and Punishments, including a new Translation of Beccaria's "Dei delitti e delle pene"* (London, 1880).
 L. Ferrari, *Del "Caffè," periodico milanese del secolo XVIII* (in *Annali della R. scuola normale di Pisa*, 1900).
 H. Fielding, *Enquiry into the late increase of Robbers* (1751).
 R. Garnett, *History of Italian Literature* (London, 1898).
 O. Goldsmith, *Citizen of the World* (1760). (*Works* [London, 1854], vol. ii.)
 E. Halévy, *La Formation du radicalisme philosophique* (3 vols.), vol. i, "La Jeunesse de Bentham" (Paris, 1901).
 E. Hertz, *Voltaire und die französische Strafrechtspflege im 18ten Jahrhundert* (Stuttgart, 1887).
 J. Howard, *Account of the Principal Lazarettos in Europe* (1789).
State of the Prisons in England and Wales (1779). Fourth edition, 1790.
 G. Ives, *A History of Penal Methods* (London, 1914).
 D. Jardine, *A Reading on the Use of Torture in the Criminal Law of England previously to the Commonwealth* (London, 1837).
 S. Johnson, *The Rambler*, No. 114 (1751).
 Lord Kames, *Historical Law Tracts, Criminal Law* (1776).

- E. Landry, *Cesare Beccaria, Scritti e lettere inediti* (Milano, 1910).
 W. E. H. Lecky, *History of England in the Eighteenth Century*; vol. vi (1887).
 Sir J. Macdonell, "Jeremy Bentham," in *Dictionary of National Biography*.
 R. J. Mackintosh (Ed.), *Memoirs of the Life of Sir J. Mackintosh*, 2 vols. (London, 1835).
 M. Madan, *Thoughts on Executive Justice* (London, 1784).
 E. Masmonteil, *La Législation criminelle dans l'œuvre de Voltaire* (Paris, 1901).
 Sir H. Maxwell (Ed.), *The Creevey Papers* (1904).
 J. S. Mill, *Dissertations and Discussions* (London, 1867). (Essay on Bentham in vol. i, pp. 330 seq.)
 Montesquieu, *Esprit des lois*.
Lettres persanes.
 Abbé Morellet, *Mémoires* (Paris, 1823).
 Lord Morley, *Diderot and the Encyclopædists* (London, 1878).
 W. Paley, *Principles of Moral and Political Philosophy* (1785).
 G. R. Porter, *The Progress of the Nation*, etc. (1851).
 J. M. Rigg, "Sir Samuel Romilly," in *Dictionary of National Biography*.
 Sir Samuel Romilly, Article in *Edinburgh Review* (November 1817) on Bentham's *Papers relative to Codification and Public Instruction*.
Memoirs of the Life of Sir Samuel Romilly written by himself; with a selection from his Correspondence. Edited by his sons, 3 vols. Second edition (London, 1840).
Observations on a late publication (London, 1786).
Speeches in the House of Commons, 2 vols. (London, 1820).
Thoughts on the probable influence of the French Revolution (1790). (Published anonymously.)
 B. Rush, *An Enquiry into the Effects of Public Punishments upon Criminals and upon Society* (Philadelphia, 1787).
 R. Rush, *Residence at the Court of London* (London, 1872).
 A. Siegwart, *Bentham's Werke und ihre Publikation* (Bern, 1910).
 Adam Smith, *Wealth of Nations*.
 Sir J. F. Stephen, *History of the Criminal Law of England*, 3 vols. (London, 1883).
 Sir L. Stephen, *The English Utilitarians*, 3 vols. (London, 1900). (Especially vol. i.)
 W. Tooke, *Life of Catherine II* (London, 1800).
 R. J. Turnbull, *A Visit to the Philadelphia Prison* (Philadelphia, 1796).
 G. A. Venturi, *Cesare Beccaria e le lettere di P. e di A. Verri* (Ancona, 1882).
 P. Villari, *Le opere di C. Beccaria, precedute da un discorso sulla vita e le opere dell' autore* (1854).
 Voltaire, *Commentaire sur le livre des délits et des peines*. Par un avocat de province ([Genève] 1766).
Dictionnaire philosophique (various articles).
Prix de la justice et de l'humanité. (Other writings of Voltaire relative to criminal law and administration are referred to in the course of the work.)
 G. Wallas, *Life of Francis Place* (London, 1898).
 Brissot de Warville, *Bibliothèque philosophique du législateur, du politique, du jurisconsulte*, 10 vols. (Paris and Berlin, 1782-1785).
 W. Whewell, *Lectures on the History of Moral Philosophy in England* (1852).
 J. Williams, "Torture," in *Encyclopædia Britannica*, eleventh edition.
 Sir R. K. Wilson, *History of Modern English Law* (London, 1875).
Annual Biography and Obituary (London, 1833).
Annual Register (1760).
Edinburgh Review, vol. lxxviii (October 1843).
Monthly Review (March 1810).
Parliamentary History of England, vol. xxviii.

PART I

CESARE BECCARIA (1738-1794)

THREE CRIMINAL LAW REFORMERS

CHAPTER I

LIFE OF BECCARIA

CESARE BONESANA, Marchese di Beccaria, was born in Milan, March 15, 1738. His father was the Marchese Gian Saverio Beccaria Bonesana, and his mother Maria Visconti da Rho. Amongst the family's ancestors, originating from Pavia, were found ecclesiastical dignitaries, judges, and men of military distinction. Young Beccaria was sent to the Jesuit College in Parma, where he remained for some eight years. Here he did not show any remarkable capacity in his work, nor did he reveal any studious inclination. On the contrary, he was usually discontented with the schooling he obtained; the greater part of the prevailing curriculum and the mode of instruction failed to arouse his interests. Sometimes, however, a new idea or an interesting fact would excite his curiosity and draw him away from his state of indifference and inertia. From logic and philosophy, with their artificial syllogisms, *a priori* dogmatic constructions, lifeless formalism, he turned to the study of classical literature. This subject he likewise found devoid of vitality; the mechanical imitation of phraseology, investigation into words rather than things, had no charm for him. He finally took up mathematics, and for a time fell in love with it; the cogent reasoning which the study demanded, the firm foundation on reality, the absence of unwarrantable assumptions, the inferring of true conclusions from acceptable data, the constant appeal to impartial reason rather than to prejudice and tradition, at last awakened his enthusiasm and made him feel that he began to breathe a purer, clearer air. But later mathematics, too, lost a good deal of its attraction, and failed to satisfy him. His mind yearned for something else to minister to his positive spirit. And so, tired of everything, he remained idle and miserable.

Soon after his return to Milan, at the age of about twenty-one, he came across Montesquieu's *Persian Letters*. Its perusal immediately aroused him from his wonted lethargy, and pointed out to him his mission—a devotion to social philosophy with a view to effecting reforms in many parts of the existing constitution of society. He then took up the French literature of the time, and became a fervent admirer and faithful adherent of the Encyclopædist philosophers. In contrast to his earlier life at the college in Parma, he now manifested a studious spirit, and soon began to examine the prevailing institutions and conditions of social life, from the point of view of the doctrines of Diderot and his colleagues. After the fashion of many young nobles he spent some time in the study of law at Pavia; but unlike the majority of the students he was not satisfied with mastering its tests or applying it to particular cases—he constantly analysed every positive or customary law into its actual substance, its *raison d'être*, and its relation to actual requirements. Thus he contemplated the *principles* of criminal legislation from the point of view of the conditions of progress, the advance of civilisation, the happiness of the individual, and the general interest of the community.

At the end of the year 1760, Beccaria met and fell deeply in love with Teresa, the sixteen-years-old daughter of Domenico di Blasco, a lieutenant-colonel, who belonged to a noble family of Sicilian-Spanish origin. The young lover's father was against the match, owing to the comparative poverty of Blasco, but he found himself unable to turn his son away from his passionate attachment. Thereupon, he resorted to the right conferred on him by the provisions of the "patria potestas," and appealed to the magisterial authorities to put his son under arrest, "in order that he might the more leisurely reflect on his condition." An order was accordingly issued, but on the request of the young man, steadfast in his ardent affection, the paternal house was assigned to him as his place of incarceration. At the same time, the Marquis Stampa Soncino was charged to dissuade him from his intentions, and to do everything possible to restore peace and harmony in the distraught household. But neither the Marquis Stampa nor even the eminent minister Kaunitz could overcome the constancy of the lover. In the meantime, also, the young lady's father made an appeal to the Empress herself, Maria Theresa, and pointed out his own nobility, the sacrifice he was

prepared to make to procure a dowry for his daughter, and the young man's warm affection. However, after a confinement of some three months, Cæsar was set at liberty in February 1761, and he forthwith married his adored one. The Marquis Saverio refused for a time to receive his daughter-in-law; and Cæsar, having obtained from him some means by the intervention of Cerrati, a distinguished member of the Senate, was able to live in a modest and reserved manner, until his reconciliation with his father, due in great part to the mediation of Pietro Verri.

Apart from the delights of Beccaria's conjugal love, his main interest in Milan was centred in the society of a small select circle of friends, young men of talent and spirited enthusiasm, who were disgusted with the wretched state of the economic organisation of Lombardy, with the disorders of government, consequent on the late Spanish domination, with the irregularities and excesses of a barbarous penal code, and were therefore determined to do something to combat the tyranny of pedants, to disperse the atmosphere of hatred and deceit which had enveloped the population, to enlighten their countrymen as to their true interests and the welfare of the community, and to establish philosophy on a rational and practical basis.¹ The leader of this band of ardent souls—which called itself the "Accademia (or Società) dei Pugni"—was Pietro Verri, in whose house the friends met to read, to work, to hold consultations and discussions on social and political affairs, to study select works of French, English, and Italian literature and philosophy, to summarise them and make excerpts from them. In this private association the members assumed the names of distinguished personages of Roman history. Thus Pietro Verri was termed Lucius Cornelius Sulla, his brother Alessandro Verri was Marcus Claudius Marcellus, Biffi was Publius Cornelius Scipio, Visconti was dubbed Quintus Hortensius, and Beccaria was Titus Pomponius Atticus, and so on with the others.² Another who exercised some influence on Beccaria was Paolo Frisi, an able mathematician, and a corresponding associate of the French Academy of Science. But more than any other, Pietro Verri, who was some ten years older than Beccaria, stimulated him, urged him to get rid of his too reserved, retiring, idly contemplative disposition, and produce a work worthy of his real capacity. Pietro Verri, a scion of an illustrious

¹ For a fuller account of the states of Italy at this time, see *infra*.

² Cf. Ferrari, *Del "Caffè"* (in *Annali della R. scuola normale di Pisa*, 1900).

Milanese family, possessed wide learning, energy, and decision of character, a noble mind, and a loving regard for his fellow-creatures. His father had intended him for the profession of law, but he preferred literature, and wrote poetry. Tired of his life in Milan, he went to Vienna, entered the Austrian military service, became a captain, and fought in two battles in which he distinguished himself by his valour. In 1760 he returned to Milan. He interested himself more particularly in economic questions. His younger brother, Alessandro, held the public position of "Protector of prisoners," in which capacity he visited prisons, investigated the grievances of the prisoners, and where possible urged reasons for their defence or pardon. The wretched sights he witnessed made a profound impression on him, and so he was able to lay before the members of the Society a statement of his personal experiences, and numerous facts relating to the condition of prisoners, their houses of incarceration, and the practices prevailing therein. Thus the reform of the penal law became one of the most important objects of the group of friends; and the task of specially considering and producing a work on it was assigned to Beccaria. As a result of P. Verri's encouragement, Beccaria wrote and published his first work, *Del disordine e dei rimedi delle monete nello stato di Milano nell' anno 1762* ("On the Disorders and the Remedies of the Currency in Milan in the year 1762").

In March 1763 he began his celebrated work on crimes and punishments (*Dei delitti e delle pene*), and completed it in January 1764. The first draft he read to the circle, and entrusted it to P. Verri, who re-arranged it, retouched it here and there, and made a fair copy. It was published anonymously at Leghorn in July 1764. P. Verri thus describes, in a letter, the genesis and composition of the work and the part he himself played in its completion: "The book is by the Marquis Beccaria. I suggested the argument to him, and the greater part of the ideas is the result of daily conversation between Beccaria, Alessandro, Lambertenghi, and myself. The evenings of our society were passed in the same room, each one engaged in some work, Alessandro being occupied with the 'History of Italy,' I with my investigations into political economy, others with law; whilst Beccaria was often bored, and wearied the others. In despair he asked me for a subject; I suggested this one to him, knowing that it was perfectly adapted to a man of eloquence and lively

imagination. But he knew nothing of our criminal methods. Alessandro, who was the 'Protector of prisoners,' promised to help him. Beccaria began to write down some of his ideas on loose pieces of papers, we seconded him with enthusiasm, stimulated him so much that he soon got together a great multitude of ideas. After dinner we would take a walk, discuss the defects of criminal jurisprudence, and in the evening he would put his conclusions in writing. But so toilsome did he find writing, and it cost him so much exertion, that after an hour he would cease through lack of perseverance. The materials that he had amassed I wrote out, arranged them in order, and thus made a book of them."¹ This account was substantially confirmed by a letter written to the Abbé Morellet by Beccaria himself, who speaks of Pietro Verri's estimable qualities of heart and mind, describes him as his greatest friend, and states that it was due to him that the manuscript was prepared for publication.² Owing to his ineradicable indisposition to activity, Beccaria would have preferred obscurity to fame and glory; and it was chiefly the esteem entertained for Pietro that actuated him to prepare a second edition; even then he begged Verri not only to revise the spelling but also to cut out, to add, or correct freely as he saw fit.³

In the meantime the circle of friends gained accessions, and they determined that their meetings should bear more fruit. Accordingly in June 1764 they established a periodical, *Il Caffè*, modelled on Addison's *Spectator*; and they issued it every tenth day for a period of some two years. Their aim was to propagate useful knowledge in an agreeable form among the Milanese, and to combat the prevailing bigotry and pedantic attachment to old traditions, ill-adapted as they were to progress and actual needs. Although the contributors manifested no hostility to the government, and avoided bitterness and scurrility in dealing with existing institutions and predominating ideas, they preferred to remain anonymous, and to publish their journal at Brescia, which was outside the Milanese state. In the name of truth, humanity, and social economy, their articles were written

¹ *Lettere e scritti inediti di Pietro e di Alessandro Verri*. Ed. C. Casati. 4 vols. (Milano, 1879-1881), vol. ii, pp. 189, 190.

² "È uomo pregevolissimo per le qualità sì del cuore che della mente, ed il più caro amico che io mi abbia. Parmi di provare per lui quello stesso entusiasmo d'amicizia che Montaigne per Stefano di La Boétie. Egli mi ha fatto animo a scrivere: a lui vo' debitore di non aver gettato al fuoco il manoscritto 'de' Delitti' ch'egli ebbe la compiacenza di trascrivere di propria mano."

³ "Circa le correzioni del libro ed al libro medesimo, togli, aggiungi, correggi liberamente; chè mi farai un gran servizio e piacere."

with—considering the time—a marked freedom of investigation, and intrepid development of ideas. Uniformity of doctrines was not claimed by the body of collaborators. Soon the *Caffè* came to be regarded by discerning readers as the educator and inspirer of the nation, and as the home of innovators. Among the more interesting contributions were those of Beccaria—the *Fragment on Style*, his article on *Periodical Newspapers*, and his essay on *Pleasures of the Imagination*. The *Fragment on Style* was later expanded by the author into a small treatise. He urged that it was necessary to take into account not only the principle of the association of ideas (conformably to the point of view of Blair and other British writers), but all the faculties of the intellect, and the imaginative flights of the soul. Like the later German writers on æsthetics, he regarded the art of literary composition as being closely related to the science of psychology, and held that the investigation into the origin and significance of the beautiful, the useful, and the good—in other words, into the basis of the fine arts, politics, and ethics—is necessarily involved in the study of human nature, and that the cultivation of all them is summed up in the search for happiness; that is, that there is a common fundamental principle underlying them, and so effecting an indissoluble union between them. Thus Beccaria's view is akin to the modern point of view, which, however, is itself only a revival of the Platonic conception of the unity of knowledge and virtue. In his *Pleasures of the Imagination* he eulogises the retired contemplative life. He advises his reader to withdraw from the human turmoil, and merely look on at men running hither and thither in their blind confusion, to have little intercourse with them, and, if he will do them any good, to do it at a distance so as to avoid being dragged into their vortex. He believes it is best to enjoy, in tranquil meditation, the few fleeting moments that intervene between the cradle and the grave. Let him, he observes, who would gain desirable peace leave the mass of mankind with their restless struggles and ambitious aspirations, and repose placidly in an enlightened indifference to human things; such attitude will not necessarily deprive him of the gratification due to the exercise, in his own way, of the virtues of benevolence and justice, but it will protect him from the troubles and vicissitudes that harass the majority of men.

Beccaria might possibly have been prevailed upon to contribute to the magazine further results of his communings with himself,

and of the conversations with his colleagues, had not the *Caffè* come to a rather sudden end in May 1766, when the Society itself was dissolved. In the last number issued there was an explanatory announcement to the effect that some of the members had departed on protracted journeys, and that others had decided to devote themselves entirely to public or to private affairs. It was then that Beccaria and Alessandro Verri had set out to Paris, in response to an invitation from the Encyclopædists; of which visit more will be said presently. It appears that some dissension had arisen among the old members of the Academy, and that they had been divided into two parties, between whom there existed for some years much mutual jealousy and suspicion. On the one side we find Beccaria, Visconti, Odazzi, and Calderari; on the other Pietro Verri, Lambertenghi, Secchi, and Biffi.¹

To return to the publication of the *Dei Delitti*.² The work was at once hailed with unbounded enthusiasm. A more opportune moment for its appearance there could not have been. Men of thought were animated with indignation at the ferocious criminal law, and at the brutality of authorities in their entire disregard of human life. Bolder spirits ventured to speak freely of the barbarities practised and injustice meted out to victims, in the name of an antiquated and sanguinary law. Voltaire and the Encyclopædists (as will be shown more fully later) rendered inestimable service in preparing the way for more outspoken expression of opinion and for more overt and deliberate attacks on the prevailing institutions. With his mordant wit and irony, aroused by his uncompromising hostility to tyranny and superstition, Voltaire was ever ready to champion the cause of the maltreated and the defenceless. He had just stirred up Europe by his examination of the unjust trials and atrocious treatment of Calas and Sirven; and whilst he and other undaunted pioneers were bringing to light a multitude of facts, abuses and irregularities calling for reform, Beccaria came on the scene with his slender, but potent, treatise, embodying a mass of fundamental principles which summed up, in a large measure, the conclusions to be drawn from these facts, advocating a total revision of criminal law on the basis of general utility, denouncing secret accusations and torture, questioning the right of society to take judicially men's lives, questioning even the necessity of capital

¹ Cf. Ferrari, *Del "Caffè,"* loc. cit.

² For an analysis of the work, see *infra*.

punishment, condemning the entire fabric of the existing penal jurisprudence with its irrational, sanguinary, barbarous ferocity and cruelty. The stirring trumpet-call came not from free England but from shackled Italy, the least free of countries,¹ the home of the Inquisition; not from a professional philosopher or experienced lawyer or publicist, but from a young man too timid to mix with the world, and not fitted by his nature to meet its strife and buffetings.

Immediately after the publication of the book (1764), the author's friend Frisi, who was closely in touch with the intellectual movement in France, forwarded a few copies to D'Alembert who, in turn, sent one to Voltaire. The latter read it with astonishment and delight. Some two years later the Abbé Morellet issued a French translation in which he rearranged the order of the text; and within six months this translation went through seven editions. Then Voltaire produced his *Commentary*,² which follows Beccaria chapter by chapter, emphasises his arguments, quotes in support of his reasoning and conclusions numerous historic facts, and makes other observations in his own inimitable manner. The illustrious defender of Calas welcomed the book as a sign that humanitarian conceptions and a rational jurisprudence were about to dawn on the world. "Ce livre valait en morale autant que le petit nombre de spécifiques efficaces en médecine, et suffisait à balayer de la jurisprudence les restes de la barbarie." In his subsequent writings he often alludes to the book; thus in his *Dictionnaire philosophique* he defends it against Muryart de Vouglans, that "Iroquois" advocate, who asserts "que torturer, pendre, rouer, brûler dans tous les cas est toujours le meilleur." On at least two occasions Voltaire wrote to Beccaria, expressing his high esteem and suggesting a visit to Ferney; but they never met, for travelling was too burdensome a task for the Italian home-keeping author, who preferred an agreeable inactivity and was, moreover, wrapped up in his Teresa. The eminent mathematician D'Alembert, one of the main pillars of

¹ Cf. E. Bouvy, *Voltaire et l'Italie* (Paris, 1898), p. 331: "Ce n'était point de la libre Angleterre, point davantage des cours philosophiques du nord de l'Europe qu'arrivait cette réponse; c'était du pays le moins libre de tous, de l'Italie."

² *Commentaire sur le livre des délits et des peines. Par un avocat de province.* [Genève] 1766.

Voltaire's authorship has sometimes been questioned, but it is established beyond doubt. Cf. G. Bengesco, *Voltaire, Bibliographie de ses œuvres*, 4 vols. (Paris); vol. ii (1885), pp. 173-176; and for additional testimony see E. Landry, *Cesare Beccaria, Scritti e lettere inediti* (Milano, 1910), p. 154, n. 1. Further, cf. Voltaire's letter to Damilaville, July 28, 1766.

the Encyclopædist group,¹ avowed that he could not sufficiently express how much he admired the *Dei Delitti*. "Bien que petit," he observes, "ce livre suffit à assurer à son auteur un nom immortel. Quelle philosophie, quelle vérité, quelle logique, quelle précision, et en même temps quel sentiment et quelle humanité!"

In the meantime a knowledge of Beccaria's treatise spread in many parts of Europe, and also in America. In England, Blackstone quoted it in the year following its publication; together with Voltaire's *Commentary*, it was translated, anonymously, into English in 1768. The "Economic Society" of Berne awarded the unknown author its gold medal, invited him to disclose his name, and called upon him to accept the reward "as a mark of esteem due to a citizen who had dared to raise his voice on behalf of humanity against inveterate prejudice." Louis Eugene, Duke of Würtemberg, wrote to Beccaria (Feb. 4, 1766), saying he was aroused by the voice of a true defender of mankind, and that he was filled with love and admiration for the author; he assured him that, should Providence ever call upon him to rule over his fellow-creatures, he would do his utmost to abolish those barbarous penalties that had so triumphantly been assailed in the book. The following year the author was invited to St. Petersburg by the Empress Catherine II (the friend and admirer of the French philosophers), to assist in the preparation of her proposed code of law. (Needless to say, he did not go; such a long journey was too gigantic an enterprise for one of his fibre.) Everywhere he was loaded with praise.² His friend Visconti, writing to him from Venice (May 21, 1768), observes that everybody terms him the protector, the defender of humanity, that everybody desires to see him and promises him a hearty welcome, and that no one believes he is still only thirty. In Italy editions of the treatise multiplied rapidly. Because of their large number, Jean Gravier, a printer of Naples, asked the king's authority to reprint the book "in order that the money of purchasers might remain in the kingdom." The bishop of Pozzuoli, charged with the censorship, entrusted the book to one Mangieri, a professor at the university, who was requested to write a report on it. Accordingly the latter examined it, and declared that the

¹ Concerning the relationship between Beccaria and the French philosophers of the time, see *infra*.

² As to the reception and influence of his book in various countries, see the last chapter on Beccaria.

author treats as unjust and barbarous the Roman jurisprudence, in spite of the homage paid to it by the most civilised nations, that he criticises the preceding ages and legislators, whom he reproaches for having spilt too much blood of citizens, that he is moved by a liberal and philosophic spirit, and wishes to ameliorate the conditions of society, and that above all he endeavours to show that penal rigour is inconsistent with the aim the sovereign ought constantly to have in view; the examiner concludes that the work is not contrary to revelation or divine law, that it is not seditious, and consequently suggests that its publication may be allowed within the Neapolitan Kingdom. Gravier then issued the *Dei Delitti* and the minor writings of Beccaria, in three parts which included an Italian translation of Voltaire's *Commentary*, and also a striking frontispiece portraying an executioner presenting human heads to shrinking Justice, at whose feet are placed chains, irons, and other instruments of torture.

Considering the nature of the times, it would indeed be most extraordinary if a work like Beccaria's, conveying a definite challenge to the upholders of the existing barbarous institutions, and representing a spirit of decisive innovation, did not arouse a good deal of controversy, and provoke violent attacks. (The above-mentioned report, drawn up as it was under clerical auspices, set forth an inexplicably enlightened opinion; its excellent example was but little followed by other authorities.) As is usual in such cases, some of these attacks were merely personal. There were irresponsible gossips who said that Beccaria was falsely credited with the authorship of the book, which was really written by Verri or by the Encyclopædists. Others repeated the story that once, believing he was robbed by a servant who obstinately denied the offence, he caused him to be put to the torture. Parini poured contempt on him because he had dared to attack the nobility. But such personal attacks may be disregarded. Those directed against the book itself are of greater consequence. For some time before the publication of the work the republic of Venice had been in a disturbed state. The Inquisitorial Council of Ten, charged with the maintenance of public order and safety, made use of espionage and secret denunciations, and paid heed only to narrowly interpreted reasons of state. In 1761 Angelo Quirini, a disciple of Voltaire, having been appointed advocate-general, proposed several reforms,

such as the abolition of secret procedure, but was soon arrested and removed from his position. A controversy followed, but the view of Foscarini, who was opposed to innovation, prevailed. Now this system of procedure, used by the Council of Ten, was attacked in the *Dei Delitti*, which the oligarchical party of Venice first thought to be the production of the opposition party, led by Quirini. Accordingly they charged Angelo Fachinei, a Dominican monk of Vallombrosa, to refute it. The latter, in his *Notes and Observations*,¹ begins by avowing his love of truth and his intention to express his remarks dispassionately. But he immediately forgets his good resolutions—which, indeed, he could never have made sincerely—and hurls at the innocent author a succession of insults and abusive epithets, which remind us of the worst features of the unconscionable pamphleteer's resources. He calls him a fanatic, an impostor, a fool, a madman; his work is described as unrestrained satire, full of venomous bitterness, infamous calumny, perfidious chicane, dissimulation, specious fallacy, irrelevance. He declares that the book is written in the tone of all works that make a great noise because of their revolting and odious novelty; that it is come from the deepest pit of darkness to endanger governments, satirise monks, calumniate the Church, revile the Inquisition, and seduce the public; that it bundles together clumsy contradictions with perfidious insinuations, bold blasphemy with insolent irony and indecent pleasantries; that the author cunningly hides himself in anonymity the better to make his attacks on altars and thrones. He adds that he has read several historical and polemical works written by protestants of all nations and sects in their fury against Rome, but he has found none of such a black and odious type, none marked by such sacrilegious imposture, dangerous subtlety, and outrageous slander. (That a man presumably possessed of his reason can write thus of such a book as the *Dei Delitti* is one of those psychological marvels that defy explanation.) The worthy censor, unlike the impious author, is in favour of secret accusations as the best, the most expeditious, cheapest, and most effective means of administering justice, supports torture as offering a benefit and a mercy to a criminal by purging him in his death from the sin of falsehood, and prefers the Italian judge and his method to the English, so impudently held up as an example by the author. These *Notes and Observations* reached

¹ *Note ed osservazioni sul libro "Dei delitti e delle pene."*

Milan, January 15, 1765, and soon afterwards a reply¹ was anonymously issued at Lugano by the brothers Verri.² The latter wisely refrained from retaliatory methods and language, and devoted their attention to answering the numerous charges of sedition and irreligion. However, it was very probably the protection of Count Firmian, the liberal and enlightened minister of Maria Theresa, that saved Beccaria from persecution; for in his report to the Court of Vienna, he described the *Reply* as being "full of moderation and honourable to the author's character." Moreover, the Count was himself in complete agreement with Beccaria's views on torture. A few years later the author dedicated his treatise on style to Firmian, thanking him for having dispersed the clouds that envy and ignorance had gathered thick over his head, and for having protected one whose only object had been to assert with the greatest respect and moderation what was in the interests of mankind.

Fachinei's attack was soon followed by others. Apart from those assailants who replied from a theological point of view, there were practising lawyers and legal theorists who published criticisms, purporting to be based on juridical grounds. Thus, in France Muyart de Vouglans,³ an advocate of the parlement of Paris and councillor in the parlement of the Chancellor Maupeou, is at pains to defend the penal jurisprudence and criminal procedure of France. In his denunciation of Beccaria and of his plea for a more rational adjustment of offences and penalties, he urges that the cause of the existence of so much crime is, on the contrary, that the laws are not severe enough, and he exclaims: "Que penser d'un auteur qui prétend élever son système sur le débris de ceux admis jusqu'ici, qui pour l'accréditer fait le procès à toutes les nations policées; qui n'épargne ni les législations, ni les magistrats, ni les jurisconsultes?"—a rhetorical inconsequence appropriate to a special pleader of the time. D. Jousse,⁴ an author of several legal works, says that Beccaria's book, instead of throwing light on crimes, and on the punish-

¹ *Risposta ad uno scritto che s' intitola " Note ed osservazioni sul libro ' Dei delitti e delle pene'"* (Lugano). It was afterwards reprinted in the Haarlem edition of the *Dei Delitti* (1766).

² This reply, written in the first person, was usually regarded as that of the author of the *Dei Delitti*, but, it is now proved indisputably, by the letters of the Verris, that it was their work. Cf. Casati, *Lettere, passim*.

³ *Réfutation des principes hasardés dans le " Traité des délits et des peines "* (Paris, 1767).

⁴ *Commentaire sur le livre " Des délits et des peines " (1767); Traité de la justice criminelle en France* (Paris, 1771).

ments to be imposed, tends to set up a most dangerous system, and to introduce new ideas which, if adopted, would completely overthrow the laws hitherto accepted by the most civilised nations. Linguet, a pronounced obscurantist and an enemy of the Encyclopædists, vehemently assailed Beccaria's views, and did not hesitate to make mendacious statements about the author. In Italy violent attacks were published for several years after the appearance of the *Dei Delitti*.¹ The arguments used—when they were not merely unbridled execrations—were the usual ones directed against every innovator: Beccaria was termed an arrogant fellow, a contemner of laws admired for centuries (as enemies of reform in England would say, “established by the wisdom of our ancestors”); he, a young man, was held up to pity or derision for pretending to know the object and methods of criminal law better than those who had passed long lives in unravelling the mass of old practices. A more interesting criticism than these—though it is rather a series of pessimistic reflections on the efforts of philosophers and benevolent reformers to ameliorate the condition of obstinate mankind—is contained in a noteworthy letter addressed by Ramsay, a Scottish painter and writer, to Diderot, who had shown him a copy of Beccaria's treatise; it will be referred to later in the consideration of the nature of the age in which Beccaria lived, and of the widely prevalent despair of contemporary reform. It may be said at once, however, that the *Dei Delitti* proved to be irresistible, and notwithstanding libels, anathemas, refutations, hostility, pessimisms, and despair, it achieved a glorious triumph.

Having given a brief account of our author's earlier life, his circle of friends, the issue of the *Caffè*, the publication of his truly epoch-marking work, and the hostility manifested towards it, it will be well now to conclude this concise narrative of his life. And first, as to his visit to Paris.

In the name of the Encyclopædist philosophers, Morellet invited Beccaria and Pietro Verri to Paris. Thus writes the Abbé: “En lui envoyant à Milan des exemplaires de ma traduction, je lui écrivis la lettre qu'on vient de citer, pleine de témoignages de l'estime des gens de lettres avec qui je vivais, et dont le suffrage ne pouvait que le flatter. Je l'invitais, au nom de

¹ There is no need to give details here of these; they were for the most part alike in character and spirit; so that to know the nature of one or two is to know practically all of them. Further instances will be found in Cantù, *op. cit.*, chap. xxi, *in fin.*

d'Alembert, de Diderot, d'Helvétius, du baron d'Holbach, de M. de Malesherbes, à venir passer quelque temps avec des philosophes dignes de l'entendre, et qui savaient l'apprécier. Je lui parlais de l'union qui devait régner entre les philosophes de tous les pays pour répandre les vérités utiles. Je le pressais de faire comme les anciens sages, qui allaient chercher à Samos l'école de Pythagore, à Athènes celle de Socrate, à Memphis la sagesse égyptienne." ¹ Pietro Verri was not able to leave Milan; but Alessandro, his younger brother, took his place. Their departure was arranged for October 2, 1766. Beccaria was eager to have this distinction bestowed on him, but he was loth to leave home, and especially his wife. He sobbed like a school-girl leaving her family for the first time on a long and uncertain voyage. He had now been married to her nearly six years, he was already a father, he had spent much time in cool philosophic studies, but his ardent passion for Teresa was undiminished. He was obviously unlike many of the young men of the time, with their fleeting loves and accommodating fancies. So, only by the persuasions of his friends could he at last tear himself away from her after vowing he would write to her constantly, which he certainly did. Alessandro was, on the contrary, enthusiastic, light-hearted, and his dream of the beautiful city, of its wonders, and of the distinguished people he would meet there filled him with fascinating expectations. He did his utmost to divert the melancholy, taciturn humours of his companion. When scarcely thirty miles away, Beccaria wrote: "I am continually oscillating between joy and hypochondria." Now and again he is a prey to hallucinations, and has fits of fear in the night. He gets it into his head that his wife is dead or ill, and wants to go back at once. He wakes Alessandro, and accuses him of callousness. From Lyons he writes to Pietro Verri: "My wife, my children, my friends all besiege me; my tyrant imagination does not let me enjoy the sights of nature or of art." He is desirous of returning. The reproaches of Alessandro, and the fear of being a laughing-stock to his friends at home were only just effective enough to prevent him from retracing his steps. In a letter to his wife he assures her he will not be able to be absent the whole six months, for which period the journey was planned, and asks her to prepare the way for his return, by telling his friends that the French climate does not agree with him. "Soon we shall see each other

¹ Abbé Morellet, *Mémoires* (Paris, 1823), vol. i, pp. 166, 167.

again," he adds, "for I fear there is no other remedy for my sadness." However, he managed to survive, and reached Paris, October 18, 1766. He was almost immediately introduced into the house of Baron d'Holbach, and soon met D'Alembert, Diderot, Helvétius, Morellet, Malesherbes, Marmontel, Madame Necker, and other luminaries of the day. On October 19 he writes to his wife, saying he has safely arrived after suffering many inconveniences, and is weary of the journey. He speaks of the immense city, the opulence of the people, the beauty of the streets, of the great impression everything has made on him. He goes on: "I have seen Frisi, D'Alembert, Morellet, Diderot, Baron d'Holbach, with whom I have already dined. You cannot imagine the welcome, the politeness, the eulogy, the demonstrations of friendship and esteem with which my companion and I were received. Diderot, Baron d'Holbach, and D'Alembert show themselves particularly delighted with us. D'Alembert is a superior man, and at the same time very simple. Diderot shows enthusiasm and good nature in his ways. In a word, nothing is wanting to me except your dear self. All wish to do me favours, and those who pay me such attentions are the greatest men of Europe. All deign to listen to me; no one shows the least air of superiority. . . . Remember that I love you tenderly, that I prefer my dear wife, my children, my family, my friends in Milan, and you chiefly, to the whole of Paris," and he begs her to take this as a literal truth, and not as a mere compliment.

It will be of interest to refer here to a letter of Alessandro to Pietro: "Sundays and Thursdays are the days devoted to the encyclopædist dinners at D'Holbach's, where I meet the greatest minds of the nation. Baron d'Holbach is an adorable man; he possesses great knowledge, kindness and wit. The tone of the society of this house is free, and one feels at home there. Diderot is simplicity itself; an excellent and very sympathetic man, he speaks with fire; he shows himself in conversation and in all things as he appears in his books. D'Alembert, whilst speaking, does not seem so preoccupied with his reputation, as with the desire to show himself amiable, generous, affable, a good man. Helvétius bears the imprint of genius on his brow; robust and sublime in his book, he is, in conversation, of a gentleness almost feminine. Marmontel has very lively discussions with Morellet during dinner; and they continue till their departure. They seem to become furious with each other, and go for each other like dogs;

and yet they all remain good friends. Generally they like frank and free discussion. At first this custom seems strange and harsh; but after a time you find it excellent, because you do as the others do, and you are sure not to be offended by words, however sharp they may be. They stamp, they scream like madmen; but at bottom they possess admirable sincerity and amenity."

This was all very agreeable to the vivacious Alessandro; it could not divert the home-sick yearnings of Beccaria. The society of some of the leading literary men and philosophers of Europe, as well as that of some of the most intellectual and charming women of Paris, evidently proved an extremely inadequate substitute for the object of his conjugal adoration. Writing but a week after his arrival, he assures her confidentially that his health is good, but advises her to proclaim the contrary, so as to afford a decent pretext for his earlier return. "I cannot possibly remain at a distance from you, my soul! Nothing distracts me; nothing can make me forget that you are away from me. If I had the means necessary to get you to come here, I would do so; but it is impossible; the expense is very great. I shall therefore return to Milan." He goes on to describe to her the great kindness of all, says that he is the object of the most flattering praise, that he is considered the colleague and comrade of the greatest men of Europe, that he is regarded with admiration and curiosity, that all are eager to secure his company, in the capital of pleasures; yet he is unhappy, for he is far from her. He also encloses a fictitious letter, in which he speaks of his bad health, so that she may show this one to his friends. Was it a severe attack of jealousy? Or was it simply the very ecstasy of uxoriousness? Teresa, in her letters to her husband, did not forget he was in the centre of fashion; unlike his, her affection was not an undivided obsession. So that we find him saying, in his reply: "Dear little marchioness, I remember the cut of the costume, and the commissions you charged me with; I shall fulfil them faithfully and with pleasure; I shall have the consolation of bringing you the things personally." In another letter he gives her a description of Paris, and dilates on the French theatre. He again says that all the men of letters receive him with open arms; what they say of him and do for him might turn the heads of some people, but he hopes this will not occur in his case. He observes that in their intercourse one is struck by their simplicity of manners, ease, decorum, politeness, re-

ciprocal regard, and at the same time perfect freedom; and he adds that there is no jealousy among them, or ostentation of superiority—so prevalent among his own countrymen. On November 14 he writes of his incorrigible melancholy, and says everything calls him back. He tells her he has a costume for her, which will not find its equal in Milan, and he promises to get the face pomade she had asked for. Accordingly, furnished with costume and pomade, and wearied of the attractions of the city of gaiety and intellect, he made a rapid journey back alone. He appears to have left a rather unfavourable impression behind him, in regard to his manner and disposition, and to have been supplanted, in the personal affections of the French circle, by Alessandro. Morellet states that it was this fact, in addition to his home-sickness, that brought about his early return. “ Mais nous eûmes bientôt une triste expérience de la faiblesse humaine. Beccaria s’était arraché d’auprès d’une jeune femme dont il était jaloux, et ce sentiment l’aurait fait retourner sur ses pas, de Lyon à Milan, si son ami ne l’eût pas entraîné. Enfin, il arrive sombre et concentré, et on n’en peut pas tirer quatre paroles. Son ami, au contraire, d’une jolie figure, d’un caractère facile, gai, prenant à tout, attira bientôt de préférence les soins et les attentions de la société. Ce fut ce qui acheva de tourner la tête au pauvre Beccaria qui, après avoir passé trois semaines ou un mois à Paris, s’en retourna seul, nous laissant, pour les gages, le comte Véri. Vers la fin de son séjour, sa tête et son humeur étaient si altérées, qu’il restait confiné dans sa chambre d’auberge, où, mon frère et moi, nous allions lui faire compagnie, et où nous tâchions, inutilement, de le calmer.”¹

The journey to Paris had a disastrous effect on the friendship between Beccaria and the Verris. There seems to have arisen a good deal of spitefulness and petty jealousy between them. In the correspondence of Pietro and Alessandro we meet with complaints as to Beccaria’s Parisian airs, his lack of gratitude, his egoism, and his literary pride; we find expressions of bitterness and vindictiveness. They rejoice to think that his reputation is diminishing, that his illustrious friends in Paris have forgotten him, they hear with delight of adverse criticisms of the *Dei Delitti*, and hope that his “golden book” is shut up for ever.² Alessandro is fain to discover means of mortifying his former companion, and so gladly extends his travels abroad, in order

¹ *Mémoires*, vol. i, pp. 167, 168.

² Casati, *Lettere*, vol. ii, p. 221.

that Beccaria may compare unfavourably in the eyes of their friends in Milan. Both Alessandro and Pietro call him abusive names—harlequin, imbecile, madman; they readily give ear to all that gossip says to his discredit.¹ In every possible circumstance Pietro is ready to detect an intended slight, and he is particularly aggrieved where his literary ambition is concerned. Alessandro alleges that on one occasion when the *Reply* to Fachinei was praised, Beccaria did not disavow its authorship, and by this hypocritical acquiescence obtained more than was due to him. Pietro is therefore exasperated that the author of the *Dei Delitti* should also receive credit for work not his own, to which he did not contribute so much as a comma.² He even says he could easily find in various writers—such as Montesquieu, Helvétius, Voltaire, Grævius—many passages which would make Beccaria look like a plagiarist; but he hastens to add that he is not the man to do such a thing.³ He frequently expresses a feeling of pride as well as of indignation, and considers that his own glory has been taken away from him. “Europe has declared,” he exclaims, “that he is greater than I; my conscience declares quite the contrary.”⁴ He therefore has no compunction in calling him a big impostor—“impostorissimo”;⁵ and observes that even Beccaria’s sister, the Countess Isimbardi, cannot but take his part against her own brother.⁶ Indeed, divers passages in this correspondence show that the main cause of the breach was Pietro’s disappointed literary vanity, and his jealousy of the success (surpassing all expectations) which he had himself aided his friend to achieve. But when Beccaria, soon after his return home, accused Pietro of abusing his friendship with Teresa, it was the last straw; thenceforth Pietro held his former friend in detestation. There is no doubt that Beccaria’s disposition—an awkward timidity and listlessness, combined with a somewhat magnified sense of his fame, and over-sensitiveness as to his wife’s relations with his friends—could not but cause irritation and ill-feeling.

The remaining events of Beccaria’s life are soon told. Indeed, there is little to tell. The later portion of his life did not correspond to his earlier promise, which was so strikingly shown in his literary achievement. Whether he was satisfied to rest on his

¹ Casati, *Lettere*, vol. ii, p. 150.

² *Ibid.*, vol. ii, p. 63; cf. vol. i, p. 391; vol. ii, pp. 70, 127, 151, 211, 295.

³ *Ibid.*, vol. ii, p. 23.

⁴ *Ibid.*, vol. i, p. 364.

⁵ *Ibid.*, vol. ii, p. 75.

⁶ *Ibid.*, vol. ii, p. 196.

laurels, or had come to the end of his capabilities and talent, or had reached the conclusion that all is vanity and that a "dolce far niente" is best, it is difficult to say. As Morellet observes: "Revenu à Milan, il a fait peu de chose, et sa fin n'a pas répondu à son début; phénomène commun parmi les gens de lettres d'Italie qui ont un premier feu bien vif, mais qui, à vingt-cinq et trente ans, se désabusent comme Salomon, et reconnaissent que la science est vanité, sans avoir attendu d'être aussi savans que lui."¹ In 1767 he had an excellent opportunity in the invitation of the Empress of Russia to assist in her contemplated preparation of a new code of criminal law; and it seems, from some remarks in a letter of Pietro Verri,² that Beccaria was actually inclined at first to accept the proposal. Such inclination cannot, in truth, have been more than a passing wish; we can scarcely imagine him setting out for Russia. To one so disinclined to travel and to be away from home, St. Petersburg would surely have been "ultima Thule." However, whatever temptation he had—if he had any at all—was nipped in the bud by Kaunitz, the distinguished Austrian chancellor, and Firmian, who appointed him, November 1768, professor of political economy in the Palatine school of Milan. This was the second chair established for this subject in Italy, the first (under the title of a professorship of commerce and mechanics) having been founded in 1755 in Naples by the Florentine ecclesiastic, Bartolomeo Intieri, for Antonio Genovesi. Beccaria occupied the post for two years. His lectures on political economy (published some ten years after his death by Pietro Custodi) constitute his largest work, and, considering the date of their composition, they form a remarkable production. Penal jurisprudence and economic science are in many respects closely allied subjects; thus we find examples of criminologists who were also political and social economists, e.g. Filangieri, Rossi, Romagnosi, Bentham, and others. To this group Beccaria is a noteworthy accession. In Italy appeared a considerable number of economists; and those in the time of Beccaria belonged to the school of physiocrats. They called themselves eclectics, and emphasised that political economy is an art rather than a science. From the fundamental principle that the purpose of this art is to maximise the value of the produce of labour, as well as the duty of labourers, considered as engines, he infers that it is essential to effect a division

¹ *Mémoires*, vol. i, p. 168.

² *Lettere*, vol. ii, p. 225.

of labour, to determine the value of a labourer, and the nature and function of capital. He also makes an attempt to expound the laws of growth and population with respect to subsistence, and is thus a notable forerunner of Malthus. Like other Italian writers, he admits a natural right, but he particularly insists on the right that is established by positive law. For the divine will and the abstract law of nature he substitutes positive legislation, grounded on the principle of national utility. In general, it may be said, the greater part of his doctrines are not unlike those of the school of Adam Smith.

In April 1771, Beccaria was appointed a councillor of state and a magistrate, and a specially augmented stipend was assigned to him.

On March 14, 1774, his wife died at the age of twenty-nine, leaving two daughters;¹ and the disconsolate husband, who had adored her with unceasing and effusive passion, married, only a few weeks later (June 4, 1774), Anna Barbo (daughter of Count Barnaba Barbo), by whom he had a son Giulio.

From time to time Beccaria served on various commissions of inquiry. He prepared a memorandum (1781) in which he advocated the institution of uniform weights and measures throughout Italy; and his suggestions were well received both by social reformers and by the governing authorities. Afterwards he was nominated a member of the council of public instruction. In 1790 he was appointed a member of a public commission for the reform of civil and criminal jurisprudence in Lombardy, and the report that was issued, especially the portion relating to capital punishment (which enunciates in a fuller form the arguments advanced by Beccaria in the *Dei Delitti*), forms a valuable contribution to penology.

On November 28, 1794, he died of apoplexy. It appears that little notice was taken of his death; no public announcement was made; and for a long time no monument whatever was raised to him. There are now two statues of him in Milan, where also names of streets perpetuate his memory.

As to his personal characteristics, we have already seen above that Beccaria preferred the quiet, reserved, contemplative life

¹ Of these Giulia married in 1782 Pietro Manzoni, and became the mother of Alessandro Manzoni, author of the famous romantic novel, *I promessi sposi* (*The Betrothed*).

of a student, to the practical and active life of a busy publicist. The conflicts incidental to a public life he would gladly leave to those of a hardier mould. In his youthful production, *The Pleasures of the Imagination*, he expresses sentiments savouring of a mild epicureanism. Life seemed to him a desert, in which a few oases, offering some pleasures, lie scattered here and there. Let others, he would say to his reader, entertain high hopes, fight for lofty causes or the world's rewards, and then die; let others thirst with overweening ambition, cherish insatiable desires, and subject themselves to the uncertain fortunes of strife and warfare. Far better is it, on the contrary, to cultivate an enlightened indifference to affairs, to be contented with the fulfilment of moderate desires, to avoid all such things as may occasion remorse, to recognise one's littleness and imperfections, to love retirement, to eschew the town, and withdraw to the tranquil delights of the mountains and the seashore, where the small achievements of men are so clearly realised. What the young author had preached he to a large extent practised throughout his life. He remained a spectator of the game rather than a player in it. Life's fitful fever was too harassing for one of his grain. There was a vein of melancholy in him, a certain discontent with what life had to offer, and disbelief in fundamental human virtue. He felt that such ethical ideas as had emerged after centuries of toil and bloodshed were ever ready to vanish at the touch of the slightest breeze. He could never have believed that his small treatise would have such an enormous influence,—a treatise that his friends had actually forced him to produce; he could never have imagined that it would spread so far and wide, and be everywhere acclaimed a great work. He was not equal to sustaining the burden of fame and greatness. So when, on that notable occasion, he had managed to muster up sufficient courage to go and meet the society of the French intellectuals, in response to an invitation, his taciturn and reserved temperament made his relationships with the French philosophers anything but lively, and made him feel deeply the awkwardness of his situation; and he soon bade farewell to those men and women of distinction who had been so anxious to receive him, and at the same time, and with an equal will, bade farewell to a promising career. It is characteristic of him that when on one or two occasions, in the later part of his life, the King of Naples came to visit him in his house, he purposely absented himself so as to avoid the

irksomeness of the interview. Like Bentham and Romilly he cared little for the society of the exalted and the illustrious, and like them he was indifferent to public honours, and avoided the gaze of the multitude. He was rather careless in regard to his dress (as becomes a philosopher), and careless also in his writing and even in his spelling. He was, in truth, reluctant to write at all. He allowed editors and translators to alter and arrange his treatise as they thought fit. To Morellet, in whose translation changes were made, and not for the better, he declares that the original was thereby embellished, and the arrangement adopted was preferable to his own, that he need not fear he offends the author's vanity, as a book dealing with the cause of humanity belongs, when once published, to the world and all nations equally. He despised the chatterbox petulance and the petty frivolities of the prevailing salons and cliques, to the most distinguished of which he could have had access by reason of his birth and social position. His own country appeared to him a place of exile. He preferred to live in close intimacy with a few friends in Milan, or at his country residence in Gessale, and hold communion, in his library, with Giordano Bruno, Spinoza, Voltaire and other philosophic and classical writers. But he placed the "philosophy of the heart," as he avows, above the "philosophy of the intellect." He was thoroughly conscientious and sincere, with strong convictions, and steadfast in his opinions,—which a pliable society described as obstinacy. He was frequently attacked by fierce opponents of reform; contempt and abuse were poured on him. But he consistently refrained from replying with the same weapons; indeed, he did not care to reply at all,—for a philosophically passive attitude was more congenial to his temperament. There was a certain nervous timidity in his constitution; but as a thinker and as a writer he was by no means lacking in moral courage, as the views propounded by him in the country of the Inquisition will testify. It was true that had there been in his day liberty of the press he would have more freely expanded his ideas, he would have written with less concision, occasionally bordering on obscurity, and would have been contented less with epigrammatic construction than with full and forcible utterance. To Morellet, who had, in undertaking the translation, noticed a certain obscurity in some passages, Beccaria wrote: "I must confess to you that in the course of my writing I had before my eyes the examples of Machiavelli,

Galileo, Giannone. I heard the noise of chains, shaken by superstition and fanaticism, stifling the utterance of truth. The vision of this horrible spectacle obliged me to veil sometimes the light with clouds. I was desirous of defending truth, without becoming her martyr. This idea of the necessity of obscurity has made me obscure sometimes without necessity." Beccaria cannot, of course, be classed with the noble, dauntless, self-sacrificing souls of the world; but, be it remembered, there have been many greater than himself who have not hesitated to take the course of expediency and discretion, rather than deliberately expose themselves, by their valour, to deadly assault. He preferred to avoid ecclesiastical or other persecution, and the numerous discomforts resulting from it. He thought it better to live a tranquil, undisturbed life than to die an untimely, though glorious, death for his beliefs. No! Martyrs are made of sterner stuff.

The small treatise on crimes and punishments was produced by one who was almost a stranger to juridical studies, who had no special knowledge of penal law and no experience whatever of criminal administration. It was the work of a few months, casually written out, by an unknown young man of twenty-six, who had served no apprenticeship to historical or legal scholarship, who had had but little experience of life and its problems. Yet it captivated the attention of Europe, much more than did the learned voluminous lucubrations of theologians and publicists. Why was this? In the first place, it appeared at an opportune moment; the environment in which it came to light was congenial enough to ensure its ready reception; for it summed up in a masterly, unanswerable manner the conceptions and aspirations of the progressive minds of the age. Secondly, its intrinsic qualities—simplicity of ideas, directness and clearness of expression, sober exposition, aphoristic brilliance, concise cogent reasoning—all these in combination at once struck discerning readers as a charming and acceptable novelty. In this respect it presented a remarkable contrast to the arid, tiresome composition of the obscure, over-elaborated, congested commentaries of his predecessors and contemporaries. There is a certain geometrical character in the structure of his periods, and in their union, as well as in the sequence of his ideas and arguments. Probably this is more or less due to the influence of his mathematical friend, Frisi, and to his own study of Spinoza, who set

the example of expounding philosophy in Euclidean form. Beccaria's style is as pointed and laconic as that of an accomplished French aphorist. His pithy utterances seem to mean more than they say; so that careful reading is essential to grasp their full significance and application. It is only perhaps in French that the terse, clearly cut sentences might be suitably rendered; but no adequate translation, from the point of view of literary grace and finish, has yet been made. Throughout, the author's thoughts and reasonings are set forth with judicial restraint and oracular dignity, yet with cogent force. Finally, the transparent sincerity of the writer, his uncompromising convictions, his fervent feeling, though manifestly held in check, his invincible hope of amelioration, and trust in the universal conscience of mankind, could not but arouse the enthusiasm and win the sympathy of all save the arrant obscurantists and obstinate fogies.

CHAPTER II

NATURE OF THE AGE IN WHICH BECCARIA LIVED. FORMATIVE INFLUENCES ON HIM

THE seventeenth century in Europe was one of strange contrasts. Eminent publicists and statesmen frequently pronounced discourses on justice, on natural right; distinguished writers emphasised the existence of human rights and obligations, fundamental and inalienable; poets and dramatists produced works filled with the noblest sentiments; essayists dilated on the sublime aspirations of man. Yet torture was applied daily—men were broken on the wheel, branded, mutilated, subjected to barbarous cruelties—secret accusations were encouraged, capital penalties indiscriminately multiplied, the sceptre of justice was prostituted to base uses, innumerable abuses were perpetrated, religious persecutions continued. The eighteenth century likewise offered remarkable contrasts. New ideas of liberty and toleration had emerged. The old foundations of society had been shaken. A progressive movement was advancing apace. But the old criminal jurisprudence with all its unmitigated ferocity and unreason was still in existence. In Italy, with which country we are here more particularly concerned, the period was on the whole one of recuperation. Literature, indeed, and the fine arts could not possibly attain to their earlier lustre; though, in contrast to their degeneration in general, music showed an extraordinary efflorescence and rapid development, and by reacting on the lyrical drama kindled the dramatic art into greater activity. The eighteenth century was not in Italy preceded by the vigorous movements manifested in other countries; it therefore formed the sequel of a protracted period of decadence; so that ecclesiastical tyranny and political absolutism still prevailed, and religious, political, and juridical questions could be discussed only with studied reserve and circumspection. None the less, the reforming spirit was being gradually invigorated, expression of opinion was becoming less shackled, and the menaces of the governing and inquisitorial authorities were being

less and less carried out. In many quarters pompous pedantry and obtuse prejudice still reigned; in others a vacuous frivolity was the order of the day; generally taste was fatuous and trivial, but its earlier outrageous and disgusting character was disappearing. Considering, then, the entire stream of tendencies, we may say that, before the century had come to its end, "Italy rose slowly from her abasement, like a trodden flower resuming its erect attitude, bruised but not crushed, feeble but not inanimate, obeying a natural impulse by which she could not fail to right herself in time." ¹

— This change for the better was in a great measure due to French influence. For two centuries Spanish dominion had been responsible for the introduction into Italy of a great many evils, both political and spiritual; and when once it was withdrawn, the princes and people of Italy, conscious of a great deliverance, but thoroughly exhausted by the vampire of tyranny and oppression, could not but acquiesce in the rule assumed by other foreigners less malign than their predecessors. It was scarcely a time for vigorous self-assertion, or for the manifestation of great intellectual energy—it was a time only for patient convalescence. Thus Lombardy merely slumbered under the mild rule of Austria, inactive and unaggressive as it was, but was not without hope for better, healthier days to come. The apathetic people submitted indifferently to reforms now and again pressed upon them by Joseph II and Leopold of Tuscany; several changes were introduced also by the Dukes of Piedmont. But most of these attempts to modify the existing régime were in their nature experimental; they were sporadic and factitious rather than fundamental and spontaneous. The first half of the eighteenth century was filled with wars, which brought in their train poverty, persecution, cruelty, ferocity, demoralisation generally. In the subsequent epochs of peace, French influence became very marked. New conceptions in philosophy, politics, jurisprudence, economics began to penetrate from France. Piedmont, indeed, had already been Gallicised to some extent, and, by its proximity, Milan could not escape the influence. Naples and Parma were governed by Bourbon sovereigns; the Lorrainers possessed French traditions; Gian Gastone de' Medici transformed his father's Spanish court into a French one. As is usually the case where a nation affects foreign ways, there

¹ R. Garnett, *History of Italian Literature* (London, 1898), p. 288.

was here a good deal of mere apishness and superficiality. The Elizabethans had declaimed against Italianate Englishmen ; but the upper classes in Italy welcomed Gallicised Italians. In many respects, however, French influence produced salutary results, as, for example, in the introduction of progressive conceptions for the amendment of the criminal code and penal administration,—a subject which will presently be referred to again.

Still, aspirations for better things and sincere efforts to attain originality were for the most part lacking in Italian society, whose religion, taste, manners were all founded on artificial conventions. Everyday life was a round of frivolous vanity, effusive turgid sentimentality, ceremonious affectations, and puerile pleasantry. The long-continued ecclesiastical censorship, added to Jesuit education, obscurantist and dogmatic as it was, could not be expected to produce better results. On the other hand, the lower classes, ignorant, degraded, and servile, were sunk in sordid languor and apathy, and many of them derived excitement from deeds of brigandage and smuggling, and other criminal exploits. Some of the more audacious among the crowd of adventurers resorted to the black arts, and took advantage of the ready gullibility of the superstitious. One persuaded his victims that he communicated with spirits, and could reveal the secrets of rejuvenation and immortality. Another, pretending to be able to perform miracles, formed his credulous followers into a band of so-called sibyls, who believed he would lead them to perfection. Amid all this degradation there were, however, a few sincere, conscientious rebels against the prevailing evil conditions. Outside Italy we find those who, like Lessing, Kant, Hume, Voltaire, Diderot, turned their stimulating intellects to literary and social criticism, to the elaboration of new systems of ethical and metaphysical doctrine. In Italy the current of vital thought was directed chiefly to history and law, to political and economic reform. Thus, had it not been for the exertions of men such as Vico, Giannone, Verri, Beccaria, Filangieri, Genovesi, Galiani who opposed the outworn systems and obscuring traditions, and in their place set forth rational and beneficial schemes, the eighteenth century in that country would have been a dark one indeed. Through the influence of these leading spirits, societies were here and there established, and, stirred up by a deeply-rooted discontent with the prevailing state of public and

private life, they took up an antagonistic attitude towards the declining institutions, they advocated tolerance of all opinions and religions, universal brotherhood, and a comprehensive generous philosophy which might unite thinkers and minimise the hostility between the adherents of discrepant systems, they expounded the principles of a more rational morality in harmony with the needs of a progressive civilisation, they glorified industry and enterprise, they endeavoured to estimate everything at its real value, and disengage it from irrelevant, factitious, traditional associations.

• So much for general conditions.

As to criminal law and administration we may readily infer that they were in a bad state. It not infrequently happens that the legal institutions of a country lag behind its other institutions, and, more particularly, fail to keep pace with the general material progress and intellectual and moral enlightenment of the nation. Examples are not far to seek; they are to be found in our own country as well as in every other state. The contrast is, of course, more or less striking in this or that country. Beccaria emphasised this curious fact. He saw it exemplified in his own Lombardy, which was then part of the Austrian dominions, and was under the governorship of Count Firmian, an able representative of the policy of Maria Theresa and her minister Kaunitz. The latter, who had for nearly forty years the principal direction of Austrian affairs, was a liberal patron of arts and sciences, and set himself, among other objects, to promote ecclesiastical reform. Several beneficial measures were, then, introduced into Lombardy. Agriculture was encouraged, public works were undertaken, museums and libraries established, the inordinate and misapplied power of the Church was checked, and improvements in several departments of state were introduced. And yet criminal law and procedure, and penal administration were long allowed to remain as they were. Torture was in use. Hundreds of crimes were punishable with death. Secret accusations were a drastic substitute for the impartial proof of guilt. Penalties—their kind and degree—depended not on legislative determination, but on the caprice of the magistrate. Judges had often bought their offices, and in many cases were notoriously unfitted for their functions. Terrorism was deemed the one panacea for all public and social ills. Unrestrained cruelty and ferocity, judicial disregard of human life, indiscriminate extortion of “confessions,” intimi-

dating methods of securing evidence, and mechanical means of estimating its applicability and its value, secret procedure, and sudden confrontations—all these were thought apt and sufficient measures to secure respect for life and property.

And these evils were still greater in other parts of Italy. Indeed, in the eighteenth century they existed to a greater or lesser extent in every part of Europe.¹ In France, for example, trials were still conducted in conformity with the Ordinance of 1670 which, under pretext of introducing reforms, had only aggravated the irrational and barbarous procedure which the Valois had established in 1539, and which they had themselves borrowed from the tribunals of the Inquisition. Almost everywhere, jurisdictions were multiplied, procedure was often secret, complicated, arbitrary, there was little co-ordination in the mass of provisions and in the existing practices. The methods of inquisitorial examination, the terrorising confrontation in secret, the “lettres de cachet” (disposing of obnoxious persons without any formulated charge) allowed no rights of defence. There was a maxim that where the alleged crime was a particularly heinous one, a conviction might be had on slight evidence, or on scarcely more than mere suspicion. No clear line of demarcation was drawn between an accused person and a convicted person; when the former was remanded he was treated in the interval as though he was guilty. The mere fact of accusation was considered as *prima facie* evidence of guilt; so that the prisoner was compelled to establish his innocence beyond the least doubt. All men had to be, literally, above suspicion. Men were punished for acts which they did not know to be crimes at all. As Necker said: “On remplissait les prisons et les galères de malheureux qui n’étaient souvent instruits de leurs fautes que par les punitions qu’on leur infligeait.” “Confession,” extorted amidst the horrors of the torture-chamber, was regarded as the queen of proofs, “regina probationum.” The oath was administered less as a sanction of truthful statement, than as a means of leading the prisoner to further sin by his presumed perjury; a trial was thus more the work of the executioner than of the judge. All was resolved in favour of the state; for the judges were really prosecutors, and constituted rather an arbitrary branch of the executive than an independent judiciary. There was usually no appeal against arbitrary condemnation. The particular

¹ As to our own country, see *infra*, *Bentham*, chap. ii, sec. ii.

circumstances of the trial enabled judges to exercise a tyrannical discretion in imposing punishments. In the case of nobles and ecclesiastics, however, a good many relaxations were usually made. Further, the penalties inflicted were atrocious. Men were done to death by the gibbet, the mallet, the axe, by lashing, burning, breaking on the wheel. (Examples of the penalty for high treason in England will be referred to later.) There were also infamy, consignment to the galleys, branding, amputation of limbs, the pillory (the face of the victim being sometimes smeared with honey to provide a feast for flies), fastening to the horse's tail, and other inhuman modes of retribution and degradation. Prisons were foul and horrible. The innocent and the guilty, helpless debtors and hardened cut-throats, those merely suspected and those convicted, the old and the young, men and women, the vigorous and the infirm were all thrown together in dungeons, which it is better not to describe. When we recollect the facts collected by Howard in his wonderful survey of European jails, we are bound to admit that execution was less terrible than imprisonment. From the above considerations we see, then, that criminal administration, procedure, laws, and penalties presented a nightmare of horrors; and the innocent, as well as the guilty, walked in the valley of the shadow of death.

Beccaria's work is associated, above all, with the abolition of torture. It will be well, therefore, to say a few words here about this dire engine of the penal law, as it existed before the publication of his work.¹

Torture, as part of the penalty imposed on a convicted person, was in earlier use than that applied to witnesses or to accused for the purpose of extracting evidence or a confession. We need not enlarge here on the terrible sufferings of the innocent, and on the fictitious and impossible misdeeds the victims were compelled to avow. Till the eighteenth century the legislation of most states recognised the practice. One or two countries, notably England and Sweden, were exceptions; though even there it was, in fact, resorted to in one form or another. Hellenic and Roman law sanctioned it; but classical writers, like Cicero and others, often condemned it. St. Augustine admitted its defects, but held it excusable on the ground of necessity. Until about

¹ For this portion of the chapter the writer is indebted to the article "Torture" in the *Encyclopædia Britannica*.

the thirteenth century it does not seem to have been recognised by the canon law. The reaction of Roman jurisprudence against the institutions of the Middle Ages brought about an increasing use of torture, together with an abuse of inquisitorial investigation. But in all countries and at all times there were not wanting those who repudiated the practice. In the fourteenth century Boccaccio disapproved of the blind severity of the law and of the conduct of those who, seeking the truth with such cruelty, often cause lies to sprout. They call themselves, he exclaims, ministers of justice and of God; they are only executors of the iniquity of the devil. In the sixteenth century, Montaigne unreservedly condemns it, and urges that to put a man to the rack was a test of strength and patience rather than of truth, that the infliction of pain is as likely to extort a false confession as a true one (he quotes Publius Syrus: "Etiam innocentes cogit mentiri dolor"), and that he whom the judge has tortured that he might not die innocent dies both innocent and tortured.¹ There are protests from Jean Constantin; Jean Bodin, the eminent political thinker and author of *Les six livres de la république*; Charles Dumoulin, the great systematiser of French customary law; Pierre Ayrault,² a member of the French Bar, and professor of law at Bourges; Cervantes, the immortal satirist. In the following century a German Jesuit, Friedrich von Spee, pointed out its cruelty and folly, and censured the proceedings even against witches. Similarly argued certain presidents of French courts and parlements. Other protests came from La Bruyère; Pierre Bayle; Christian Thomasius, the German philosopher and jurist; J. Grævius, the German scholar; Augustin Nicolas,³ man of letters, diplomatist, and magistrate, who endeavoured to show that torture was a fallacious, iniquitous, unchristian proceeding. Men like these had already, in the words of Montesquieu, caused the voice of nature to be heard.⁴ In the eighteenth century public opinion is more strongly aroused. Montesquieu is against torture, but expresses himself rather guardedly; ⁵ Voltaire vigorously denounces it; Beccaria gave it

¹ *Essais*, liv. ii, chap. v, "De la conscience."

² P. Ayrault, *De l'ordre et instruction judiciaire dont les Grecs et les Romains ont usé en accusations publiques conféré à l'usage de notre France* (1598). (In this work is to be found the germ of the modern principles of criminal law.)

³ A. Nicolas, *Dissertation morale et juridique si la torture est un moyen sûr à vérifier les crimes secrets* (Amsterdam, 1682). (The work is dedicated to Louis XIV.)

⁴ *Esprit des lois*, liv. vi, chap. xvii.

⁵ *Ibid.*

its death-blow. Other notable assailants were Sonnenfels in Germany, P. Verri in Italy, Bentham in England.

The defenders of torture are found chiefly among jurists and ecclesiastics, who derived their views in the main from a confused mass of heterogeneous, labyrinthine, and, for the most part, fallacious commentaries and glosses on Roman law, which they revered only a little less than divine revelation. Bacon regarded the application of torture as an experiment performed for the purpose of establishing the truth.¹ Muyart de Vouglans (who has already been referred to as an upholder of the old criminal traditions in France, and as a fierce opponent of Beccaria) attributed its origin to divine law.² Among a numerous band of other apologists may be mentioned: Simancas, bishop of Badajoz (1575); Engel (1733); Pedro de Castro (1778); and in our own country, Sir R. Wiseman.³

So much for the opponents and supporters of the practice. Now a word or two as to its use in various states.

In England the common law did not admit torture, mainly because in the English procedure the onus of proving guilt was on the accuser; in the continental the accused had to prove his innocence. Some provisions of Magna Carta and the Bill of Rights are in support of the common law principle. Though English judges have occasionally allowed torture in fact, their pronouncements are wholly against it. A notable example of this is Felton's case (1628). To the same effect are the opinions of jurists like Fortescue and Coke, of statesmen and scholars like Sir Thomas Smith, of humanists like Sir Thomas More. But in actual practice, as has been said, torture for both of the above-mentioned objects was from time to time used in England, by extraordinary courts and in virtue of the royal prerogative, though not in the case of witnesses, nor with the continental subtle distinctions.⁴ Various inflictions, however, nominally differing from regular torture received legal recognition. Thus, there was the "peine forte et dure"; if an accused stood mute of malice, instead of pleading when called upon, he was stretched on his back, an iron was laid on him, as much as he could bear, and more, and he had so to remain, fed on bad bread and stagnant water on alternate days,

¹ *Novum Organum*, bk. i, aph. 98.

² *Instituts de droit criminel* (1757).

³ *Law of Laws* (1686), p. 122.

⁴ Cf. D. Jardine, *A Reading on the Use of Torture in the Criminal Law of England previously to the Commonwealth* (London, 1837).

until he pleaded or died.¹ Sometimes a substitute for this was adopted—to tie the thumbs with whipcord. Then there were also the horrible quartering and disembowelling in the punishment of high treason,² burning in the hand for felony,³ the pillory,⁴ stocks, branks, and cucking-stool.

In Scotland torture was for a long time allowed, and was applied in many dreadful ways, not the least excruciating being the artificial prevention of sleep.

In Ireland it was not recognised by the law, and its use was comparatively rare.

In France it was regulated by royal ordinances. There were two kinds: “La question préparatoire,” inflicted on a man accused of a crime which was punishable by death, and “La question préalable,” to obtain a confession of accomplices after the condemnation of the accused.

The institution attained a high degree of development in Italy, through the expositions of a long line of writers and interpreters of custom down to the voluminous treatise of P. Farinaccius,⁵ procurator-general of Pope Paul V. Supplementary provisions were made by legislation. Torture could be applied in the case of most criminal offences and in certain civil matters. It was graduated—“levis,” “gravis,” and “gravissima.” There were many varieties; and the inventions of new ones called forth, and not in vain, the ingenuity of judges. All readers of history are familiar with the notable cases of Savonarola, Machiavelli, Giordano Bruno, Campanella, and others.

In Spain also, as well as in Portugal, the law depended on custom as expounded in the commentaries of jurists, and on legislative enactments. Philip II extended its application. Jews were frequent victims. Aragon, during its independence, enjoyed comparative immunity from it; though minor substitutes were formidable enough.

In various forms and for several crimes it was used in the other countries of Europe. In Germany and Austria there was a large number of enactments and works of commentators. In Prussia it was practically abolished by Frederick the Great by

¹ Sir James F. Stephen, *History of the Criminal Law of England* (London, 1883), vol. i, p. 297. (It was not abolished till 12 Geo. III, c. 20.)

² This remained, nominally, till 1870. See further *infra*, Romilly, chap. ii

³ Abolished by 19 Geo. III, c. 74.

⁴ Abolished by 7 Will. IV and 1 Vict. c. 23.

⁵ *Praxis et theórica criminalis* (Lyons, 1616).

a cabinet order of 1740. In the Netherlands it was inflicted on witnesses if they varied on confrontation; in Denmark, on those accused of treason; in Russia, for numerous crimes, and in atrocious forms. In Sweden, it appears, it never existed as a system, and was condemned expressly in the code of 1734; but it was sometimes inflicted (as in England) in proceedings before extraordinary courts, called secret committees.

Considering the condition of criminal law and penal administration and procedure as outlined above, we need not wonder that in many parts of Europe men despaired of reform, and thought the efforts of those who aimed at amelioration to be the vain attempts of wild visionaries and quixotic enthusiasts.

There is no need to multiply examples in order to illustrate this point of view. An interesting and characteristic instance is found in a letter written by Allan Ramsay, a Scottish painter and writer, to Diderot, who had shown him a copy of Beccaria's treatise. Ramsay (who had intended that Diderot should show Beccaria the letter¹) maintains that the penal legislation of a given country cannot be considered in the abstract, like mathematical questions, but only with reference to the particular needs of that country; he points out that the government of a country will always enforce laws with a view to its own security, and that nothing less than a general revolution will ever make a legislature pay heed to the claims of philosophers. (But these and the rest of Ramsay's observations scarcely apply to a work like Beccaria's, which expounds the fundamental principles of a rational criminal jurisprudence for a regularised community.) Ramsay's argument thus continues: "But since it would be an absurd folly to expect this general revolution, this general reconstruction, which could only be effected by very violent means, such as would be at least a very great misfortune for the present generation, and hold out an uncertain prospect of compensation for the next one, every speculative work, like the *Dei delitti e delle pene*, enters into the category of Utopias, of Platonic Republics, and other ideal governments; which display, indeed, the wit, the humanity, and the goodness of their authors, but which never have had nor ever will have any influence on human

¹ Diderot, *Œuvres complètes*, 20 vols. (Paris, 1875-1877); vol. iv, pp. 52-60. The letter is here in French; the passages quoted above are from the partial translation in Farrer, *op. cit.*

affairs.¹ . . . I know that those general principles which tend to enlighten and improve the human race are not absolutely useless . . . that the enlightenment of nations is not without some effect on their rulers . . . provided that the prerogative of the latter, their power, their security, their authority, their safety, are not touched thereby. . . . I know well that this general enlightenment, so much boasted of, is a beautiful and glorious chimera, with which philosophers love to amuse themselves, but which would soon disappear if they would open history, and see therein to what causes improved institutions are due. The nations of antiquity have passed, and those of the present will pass, before philosophy and its influence have reformed a single government.² . . . The cries of sages and philosophers are as the cries of the innocent man on the wheel, where they have never prevented, nor will ever prevent, him from expiring, with his eyes upturned to heaven, which will perhaps some day stir up enthusiasm, or religious madness, or some other avenging folly, to accomplish all that their wisdom has failed to do. It is never the oration of the philosopher that disarms the powerful ruler; it is something else, which the combination of chance events brings about. Meanwhile we must not seek to force it from him, but must entreat humbly for such good as he can grant us, that is which he can grant us without injury to himself." ■

Notwithstanding such inveterate fear and despair of reform, the work of Beccaria achieved a wonderful triumph. It contributed enormously to the forces which were set in motion in every part of Europe to ameliorate the existing conditions, to remove the antiquated and ferocious elements of criminal law and practice, and ultimately to transform fundamentally the entire fabric of penal jurisprudence. The rapidity with which this change began to be effected would have been impossible, were it not for the fact that the way had been in many respects prepared for Beccaria, that there was a growing determination in many quarters to dispel the long-endured incubus of folly and terror, and that his views were not violently novel but were shared by many contemporary thinkers and social reformers. Let us see, then, what was his relationship to these, and what were the formative influences that operated on him.

In a letter of Beccaria to Morellet, in reference to the latter's

¹ Diderot, *loc. cit.*, p. 58.

■ *Ibid.*, p. 59.

■ *Ibid.*, p. 60.

translations of the *Dei Delitti*, he acknowledges his indebtedness to France, which he terms "the mistress and illuminator of Europe." He goes on: "I owe everything to French books. They were the first to stir up in my mind feelings of humanity, which had been stifled by eight years of a fanatical education.¹ . . . D'Alembert, Diderot, Helvétius, Buffon, Hume—illustrious names, which no one can hear without emotion! Your immortal works are my continual study, the object of my occupation by day, of my meditation in the silence of night.² Full of the truth you teach, how could I ever have burned incense to worshipped error, or debased myself to lie to posterity? I find myself rewarded beyond my hopes in the tokens of esteem I have received from these celebrated men, my masters. Convey to each of these, I beg you, my most humble thanks, and assure them that I feel for them that profound and true respect which a feeling soul entertains for truth and virtue. My occupation consists in cultivating philosophy in peace, to satisfy my three strongest passions: the love of literary fame, the love of liberty, and compassion for the ills of men, slaves of so many errors. My conversion to philosophy dates back only five years,³ and I owe it above all to my perusal of the *Lettres persanes*. The second work that completed my mental revolution was that of Helvétius. The latter forced me irresistibly into the way of truth, and I aroused my attention for the first time to the blindness and miseries of humanity." After lavishing praises on these thinkers, and on Holbach, and even on the mediocre Morellet, he continues: "I lead a tranquil and solitary life, if a select company of friends, whose hearts and minds are in constant activity, can be called solitude. This alone is my consolation, and prevents me from feeling in my own country as though I were in exile. My country is still immersed in prejudices, left by its older masters. The Milanese do not forgive those who would have them live in the eighteenth century. In a capital of 120,000 inhabitants one can scarcely find twenty who love instruction, and who cultivate truth and virtue. My friends and I, persuaded that periodical publications are among the best means for encouraging reading

¹ He refers, of course, to the time he spent at the Jesuit College at Parma. See *supra*, as to his life.

² The great poet Carducci, in our own days, is moved to a similar invocation: "O books of Voltaire and Rousseau, of Diderot and Condorcet, you who have set free the human race and revolutionised the world!"

³ He wrote this letter in 1766, and his treatise had appeared in 1764; thus he refers to the time when he was about twenty-three.

among those who are incapable of more serious application, are issuing papers, after the manner of the English *Spectator*, which has, in England, contributed so much to increase mental culture and the progress of good sense. The French philosophers have a colony in this America, and we are their disciples, because we are the disciples of reason. . . .”

The influence of the prevailing French philosophy is manifest throughout the whole of Beccaria's production. In the eighteenth century in France there are perhaps no metaphysical thinkers as profound and original as some of those of the previous century—as, for example, a Descartes, a Leibnitz, a Spinoza. But, by way of compensation, a much larger number—a conspicuous galaxy—of philosophers appeared, who were imbued with more or less of rationalism, and with an ardent desire to effect a social reconstruction. They thrust aside the dogma of original sin, which so much occupied the attention of their predecessors, and endeavoured to break down the barriers that had before imprisoned the liberty of men. With passionate reiteration they demanded freedom of thought, of belief, of expression of opinion. With them came a strong reaction against antiquated and superstitious ideas, an enthusiasm for progress, a spirit of freedom in criticism, a yearning for knowledge based on reality, a recognition of humanity, rights issuing from the nature of things and deemed necessarily superior to those conferred by political arrangements or legislative manipulation. Their strength as well as their weakness lay in their contempt for tradition. All consecrated beliefs and inveterate institutions were dissolved in their disintegrating crucible. Towards the end of the century the French nation, nourished on these ideas and infuriated by public abuses, attempted the greatest task that had ever been undertaken to place society on a foundation of reason, justice, and equality. The declaration of the rights of man and of the citizen constitutes but an epitome of the doctrines of these philosophers.

In view, then, of the spirit of reform that the teaching of these thinkers thus aroused in all parts of Europe, and also in America, it is desirable to indicate their position, to show their relationship to their environment and their age, and so to make clear the formative influences on Beccaria, and, indeed, on Bentham, Romilly, and all contemporary reformers.

As Beccaria has himself stated, Montesquieu was among the first who stimulated his mind to seek for something other than

was found in the old rut of debased routine. With brilliance, audacity, and subtle irony the *Lettres persanes* (1721) satirised many things then customary—social, political, religious. The author speaks of the “two magicians,” the king and the pope, and of their cunning and arrogant impositions on slavish subjects and blind flocks; he points to the degeneration of learning and the arts, the decay of commerce and navigation, the insecurity of life and property. Little is said in these imaginary letters about criminal law and penal administration; but one or two vital points are briefly but tellingly touched upon. Thus he points out the folly and inhumanity of inflicting excessively severe penalties for crimes, and observes that in a country accustomed to a mild criminal code a light penalty has as much deterrent influence on the inhabitants, as a rigorous punishment has on the people of another country where a sterner law prevails. “. . . Dans un État les peines plus ou moins cruelles ne font pas que l’on obéisse plus aux lois. Dans les pays où les châtimens sont modérés, on les craint comme dans ceux où ils sont tyranniques et affreux. . . . L’imagination se plie d’elle-même aux mœurs du pays où l’on vit: huit jours de prison, ou une légère amende, frappent autant l’esprit d’un Européen nourri dans un pays de douceur que la perte d’un bras intimide un Asiatique.”¹ The *Esprit des lois* (1748) contributed much more to the development of Beccaria’s ideas. This is shown more particularly in the resemblance of his doctrines generally to those expounded in the twelfth book of the French writer’s work. Montesquieu emphasises the principle of the relativity of laws, the necessity of adapting them to the actual needs of a given time or place. Under the heading of political liberty he glorifies the English constitution as a mechanism rendering almost impossible legislative, executive, and judicial despotism. He gives eloquent expression to comparatively new ideas on liberty, tolerance, humanity. He points out the bearing of political liberty on criminal legislation: “Il serait aisé de prouver que, dans tous ou presque tous les États d’Europe, les peines ont diminué ou augmenté à mesure qu’on s’est plus approché ou plus éloigné de la liberté.”² His arguments are usually based on facts, not on *a priori* assumptions, and so (as becomes a former student of science) he shows himself an adherent of the experimental, inductive method in social, political, and legal philosophy. As a magistrate, however, he

¹ *Lettres persanes*, lettre lxxxix.

² *Esprit des lois*, liv. vi, chap. ix.

betrays here and there his attachment to many of the prejudices of his profession. He requires a qualitative analogy between the offence and the penalty—which is at bottom the principle of retaliation; and he insists that the punishment must not be imposed by the capricious will of the legislator, but conformably to the nature of the thing.¹ He holds that severity itself is not the most efficacious deterrent; it does not make offenders better, it habituates them to banish mildness and compassion from their hearts, and so renders them more wicked.² He shows the degeneration of criminal procedure which, with the censor and the index ever before him, he criticises rather reservedly: “ Dans la suite, il s’introduisit une forme de procédure secrète. Tout était public, tout devint caché: les interrogatoires, les informations, le récolement, la confrontation, les conclusions de la partie publique; et c’est l’usage d’aujourd’hui.”³

The gentle satire and the cold light of reason in Montesquieu paved the way for the pungent irony and poignant criticism of Voltaire, and for the concerted attacks and systematic reconstruction of the Encyclopædists generally.⁴ The celebrated *Encyclopédie*, intended originally (1740) to be a mere translation of Chambers’ *Cyclopædia*, became one of the most important original publications that had yet been undertaken; and owing to the circumstances of the time it soon constituted the most formidable weapon of attack that had yet been directed against tradition. It came to be regarded in many quarters as a veritable bible of progress and innovation. Diderot and D’Alembert were the directors of the enterprise, and they obtained contributions not only from Montesquieu and Voltaire, but also from Holbach, Helvétius, Buffon, Condillac, Marmontel, Raynal, Turgot, Necker, Quesnay, from magistrates, officers, scientists, economists, men of the world. The first volume appeared in 1751, and immediately provoked great hostility. The fears of the ecclesiastical party in particular were aroused; the Jesuits and the Jansenists at once became active opponents. After the appearance of the first two volumes, the publication was suspended by a decree in council (1752), but, thanks to protectors at court and in the cabinet,

¹ Cf. *ibid.*, liv. i, chap. i; liv. xii, chap. iv.

² *Ibid.*, liv. vi, chap. xii.

³ *Ibid.*, liv. xxviii, chap. xxxiv.

⁴ Only very brief observations are here made on this subject; for fuller information the reader may consult J. (now Lord) Morley, *Diderot and the Encyclopædists* (London, 1878); L. Ducros, *Les Encyclopédistes* (Paris, 1900); J. Fabre, *Les pères de la révolution* (Paris, 1910).

it was allowed to go on, and the next five volumes were issued, irregularly, between 1753 and 1757. Rousseau then deserted, and D'Alembert, a friend of peace, withdrew. In 1759 the privilege of publication was revoked. But Diderot remained firm, continuing his versatile activities. By 1765, having gained the sympathy of several influential personages, he overcame the resistance of the authorities; in 1772 appeared the last volume, and in 1780 the index and additions.

It was an extraordinary compilation of miscellaneous articles of varying merit—a Babel, Voltaire called it. In the hands of Diderot it remained, as he intended, a body of universal knowledge, setting forth the power and progress of reason, glorifying the sciences, arts, industries which promote the intellectual, moral, and physical welfare of mankind. Pascal had said: “Be silent, foolish reason!”; but with Diderot and his associates Reason was to be enthroned for ever; and so the creation of a rational, scientific spirit would banish theological presumption and scholastic dogma. This purpose, indicated in Diderot’s “Prospectus” (1750), was also set forth in the preliminary discourse (1751) by D'Alembert, who classified the departments of knowledge on the basis of Bacon’s conceptions, and made a survey of intellectual progress. The Encyclopædists demanded reforms, commercial and industrial, as well as legislative and political. They make war on prejudices—on prejudices of birth which exact special privileges and recognise only the vocations of soldier, courtier, or priest, on political prejudices which legitimise despotism, on religious prejudices which foster superstition. They plead the cause of workmen; they, and notably Diderot, hold that virtue is not incompatible with mechanical labour; thus a certain plebeian spirit was infused into the movement;—Diderot and D'Alembert were themselves of humble origin. They set forth more rational views on education and economics. Though their trend and object are thus to a large extent of a “utilitarian” character, they do not neglect the claims of abstract speculation and artistic and poetic creation. In fact, they were to deal with everything—destructive criticism, grappling with abuses of all kinds; constructive schemes, dealing with all sides of human life and activity. And the *Encyclopédie*, be it remembered, appeared at a time when it was forbidden to speak freely of anything; yet, by its very designation and explicitly avowed object, it was to speak of everything. Hence we must take into account

this serious difficulty, and make due allowance for the cautious, and sometimes timid, manner in which proposals are advanced. From the point of view of our present purpose, their attack on the abuses of criminal law is of the greatest interest to us. This aspect of their work will be considered presently; in the meantime, a few observations may be made regarding some of the principal members of the group in order to show the relation of their work to our subject in hand.

Diderot¹ has been termed the French Franklin.² Like Gargantua, he spent some time in different kinds of workshops, and endeavoured to show his fellow-workmen that labour rationally organised is more profitable than routine work. The vice, he says, of "all political, civil, and religious institutions" is that they have "instilled into men the poison of a morality contrary to nature." Again, "if the laws are good, morals will be good, and if the laws are bad, morals will be bad." In his eyes natural equity is superior to the positive law, the reason of humanity transcends the reason of the legislator. Diderot was interested in all things—"Pantophile" was a name given to him by Voltaire, and he deserved the appellation. Besides his contributions to the *Encyclopédie* he produced a great amount of writings—novels, plays, literary and art criticism, history, philosophical and political dissertations, a mass of brilliant correspondence; and a large part of his most esteemed work appeared posthumously. "When I recall Diderot," wrote his friend Meister,³ "the immense variety of his ideas, the amazing multiplicity of his knowledge, the rapid flight, the warmth, the impetuous tumult of his imagination, all the charm and all the disorder of his conversation, I venture to liken his character to Nature herself, exactly as he used to conceive her—

¹ Denis Diderot (1713-1784), son of a master-cutler, educated by the Jesuits, turns away from law and medicine, quarrels with his family, leads a life of badly paid toil as tutor and booksellers' hack (1734-1744), makes an unhappy marriage with a sempstress (1743). His *Pensées philosophiques* (1746) is burned by the parlement of Paris, and his *Lettre sur les aveugles* (1749), showing the dependence of knowledge on the senses, and arguing in favour of atheism, procures him three months' imprisonment. Then follows his connection with the *Encyclopédie*. Was unable to enter the French Academy, the king being opposed to him. In his later years the Empress Catherine II of Russia rescued him from pecuniary difficulties by purchasing his library, requesting him to retain the books in Paris until she required them, and providing him with a salary as her librarian; in 1773 he paid a visit to St. Petersburg to thank his benefactress in person.

² J. Fabre, *Les pères de la révolution* (Paris, 1910), p. 439.

³ J. H. Meister, the continuer (from 1773 to 1790) of the famous *Correspondance littéraire*, begun by the Abbé Raynal, and then taken up by Melchior Grimm (1753-1773). It long remained secret, and kept princely and royal personages on the Continent in touch with the various movements in Paris.

rich, fertile, abounding in germs of every sort . . . without any dominating principle, without a master, and without a God."

D'Alembert,¹ an illustrious mathematician, and a man of simple, benevolent, and independent mind, was strongly opposed to theology and metaphysics, was a sceptic as to the origin of things, and cited with approval Montaigne's "Que sais-je?" Besides the famous "Discours préliminaire" and numerous other articles in the *Encyclopédie* (the mathematical part of which he edited), he published works on mathematics, physics, the theory of music, philosophy, literary criticism, the notable pamphlet *Sur la destruction des jésuites en France* (1765), and the valuable series of his *Éloges académiques* (1779-1787). He was above all ambition and self-interest, and was ever in favour of peace and tranquillity. He considered the existing distribution of wealth as a monstrous inequality; and condemned conditions that allowed some people to be gorged to superfluity, and others to want the necessities of life. In his eyes the ideal state is one in which no citizen suffers unhappiness without deserving it. Like the other liberal spirits of the age, he condemns the prevailing penal system. "Le crime doit être puni non seulement à proportion du degré auquel le coupable a violé la loi, mais encore à proportion du rapport plus ou moins direct, plus ou moins étroit, de la loi avec le bien de la société."

Helvétius² considers interest, utility, to be the basis of morality, hunger and love the chief springs of conduct, pain and pleasure the criteria of thoughts and acts. He holds that man is the creature of his environment, that human progress and the

¹ Jean le Rond d'Alembert (1717-1783), a foundling (discovered near the church of St. Jean-le-Rond, Paris; surname added later by himself), illegitimate son of Mme. de Tencin and the Chevalier Destouches, brought up by the wife of a glazier, enters the Collège Mazarin, under the Jansenists, shows great mathematical talent, afterwards tries in vain to earn a living by law and medicine, elected (1741) a member of the Académie des Sciences, offered (1752) by Frederick the Great the presidency of the Academy of Berlin, but prefers to remain in France, and secures a royal pension; enters the French Academy (1754), and on the recommendation of Pope Benedict XIV is made a member of the Institute of Bologna (1755); refuses the invitation of Catherine II (1762) to become her son's tutor, is made secretary to the Academy (1772). He was held in great esteem by David Hume, who left him a legacy of £200.

² Claude Adrien Helvétius (1715-1771), son of a doctor (who was physician to the queen of France), was appointed farmer-general, then chamberlain to the household of Queen Marie Leszcynska; acquires some reputation as a dandy; then tries poetry, shows his efforts to Voltaire, who is not struck by them; afterwards turns his attention to mathematics, and finally to philosophy. Withdrew (1751) to his country estate, and spent his life there in educating his family, encouraging agriculture, developing industries, improving his peasantry, and in literary work. The *De l'esprit*, intended to be the rival of Montesquieu's *L'Esprit des lois*, was issued in 1758, and a posthumous volume *De l'homme* in 1772.

development of civilisation depend on man's physical conformation. "La sensibilité physique est l'homme lui-même et le principe de tout ce qu'il est." Hence ethics is to be treated as a natural science. Moral questions are at bottom social questions. We know only physical phenomena, and our senses determine our knowledge as well as our character. We have no freedom of choice between good and evil. Such a thing as absolute right does not exist, as ideas of justice and injustice change according to the customs of this or that place. The desire of happiness is to be guided aright by legislation and education. Education is omnipotent; and peace and happiness are the outcome of wise legislation, rather than of religion. All minds are nearly equal; intellectual differences result from inequality of culture. Legislation must always be the expression of public utility, and must assure the general good of society by a fitting system of punishments and rewards. The vices of a people always lie hidden in its legislation; the vicious roots must therefore be extirpated. We must emancipate ourselves from tradition. "It is by weakening the foolish veneration of the masses for ancient laws and customs," he declares, "that sovereigns will be enabled to rid the earth of the greater number of evils that afflict it, and ensure the duration of their empires."—The *De l'esprit* (1758) exercised an extraordinary influence in Europe. It was denounced by the Sorbonne as a "combination of all the various kinds of poisons scattered through modern books," and was condemned by the parlement of Paris to be publicly burned. The theological opposition was directed against it, less on account of its dangerous philosophy than because of the stinging epigrams aimed at catholicism and intolerance. Both Beccaria and Bentham, as will be seen more fully later, drew inspiration from the banned treatise; everybody read it, and it was translated into most of the European languages. No book has made more noise in its time, or spread abroad more ideas that were so quickly taken up. Voltaire declared that one part of the book consisted of commonplace, and that the more original part was false or problematical. Rousseau said the author's own benevolence gave the lie to the principles expounded by him.

Holbach,¹ like Helvétius, champions naturalism, determinism,

¹ Paul Heinrich Dietrich, Baron d'Holbach (1723–1789), born at Hildesheim in the Palatinate, and settled and died in Paris. His easy means and sociable temperament allowed him to dispense ■ generous hospitality to a large circle of notabilities—Helvétius, Diderot, D'Alembert, Turgot, Condillac, Grimm,

and sensuous cognition. He speaks of a correlation between biology and sociology, whereby morality becomes a department of physiology. His main work, *Système de la nature*, a coherent and unified exposition of views exchanged by the philosophers at his hospitable table, is a manifesto of atheistic materialism. In it he lays down that self-interest is the dominating motive of mankind, and argues that to know the temperament of an individual or of a nation is the key to attaining the best laws. Happiness is the sole object of the human race. "It would be useless and almost unjust," he declares, "to insist upon a man's being virtuous if he cannot be so without being unhappy. So long as vice renders him happy, he should love vice." The best guarantee of individual happiness is found in the establishment of a fraternal communion between men, which is at bottom the *raison d'être* of the social compact, of government, of law. He does not idolise equality, "cette chimère des démocraties," and believes that the essence of justice is to allow everyone to enjoy his faculties, rights, and all things necessary for his preservation and his happiness. He is against all positive religion; and holds that moral as well as physical laws may be explained on the basis of matter and motion, without resorting to the old illusions as to free-will, the soul, and God—God being only an imaginary entity created by kings and priests, and the soul nothing but the brain receiving and transmitting motions. The existence of vice and crime is due to the fallacious religions and bad governments that prevail everywhere; but violent revolutions are not desirable, for in the fulness of time the errors on which political and spiritual despotism is founded will be dispelled, and then man's devotion will be surely turned to Nature, and her daughters Virtue, Reason, and Truth.

Raynal,¹ like Helvétius and Holbach, opposed the autocratic

Buffon, for a time Rousseau, also Hume, Garrick, Sterne, Wilkes and others. His *Christianisme dévoilé* (1767) assailed the Christian and all other religions as the cause of human evils. A more vigorous attack was made in his *Système de la nature* (1770). Other publications are *Bon sens ou idées naturelles opposées aux idées surnaturelles* (1772), a simple summary of the preceding; *Système social* (1773), *Politique naturelle* (1773-4), *Morale universelle* (1776), and others.

¹ Guillaume Thomas François Raynal (1713-1796), born in Rouergue; educated at the Jesuit school of Pézenas, received priest's orders. Dismissed from his parish in Paris, he devoted himself to literature and to the society of the philosophers. Published the voluminous *Histoire philosophique et politique des établissements et du commerce des Européens dans les Deux Indes* (Amsterdam, 1770), in which he was substantially assisted by various members of the Encyclopædist circle. The "philosophic" declamations which are interposed throughout the work constituted democratic propaganda. The work was translated into several lan-

conditions of church and state, and as against old traditions he demanded a new régime founded on liberty, tolerance, and humanity, and guided by rational philosophy and science. In common with other leading Encyclopædists he holds that goodness or badness in citizens depends on goodness or badness of legislation and government. "Les bonnes lois se maintiennent par les bonnes mœurs; mais les bonnes mœurs s'établissent par les bonnes lois. Les hommes sont ce que le gouvernement les fait." The only object of government is to promote justice and establish common good. All citizens are to be equal and free; law alone is to be supreme. Unlike Holbach, he believes a revolution will be necessary to bring about the triumph of reason and justice, and the re-establishment of the rights of man. "Une nation ne se régénère que dans un bain de sang." Not only are the common views of the school expressed in his voluminous work, but peculiarly extravagant thoughts and sentiments also find a place in it. "Insert into my book," he said to his fellow-philosophers, "everything you choose against God, religion, and government."

These few representatives of the philosophic movement will perhaps suffice to give an idea of the whole school. The brief statement given above indicates the main views of the Encyclopædists, who exercised such a great influence in Europe, whose names stood in the eighteenth century for learning, good sense, reason, light, and in the nineteenth—though with great injustice—for ignorance, sophism, immorality, darkness.

It remains, in this chapter, to show more particularly the philosophers' attack on the evils and abuses of criminal law and procedure, and to indicate the direct relationship existing between them and Beccaria.

The great progress that has been made in criminal jurisprudence from the eighteenth to the nineteenth century is undoubtedly to a large extent due to the propagandist efforts of these philosophers.¹ We have already noted the nature of the criminal law, procedure, and penal administration that obtained

guages. Its introduction into France was prohibited in 1779; it was burned by the public executioner, and an order was issued for the arrest of the author. Raynal escaped to Berlin; then was received by Catherine II at St. Petersburg. He was allowed to return to France in 1787, though not to Paris. He lived in retirement during the Terror; and in 1795, when the Directory was established, he became a member of the Institute of France.

¹ Cf. L. Ducros, *op. cit.*, pp. 147 seq.

in France, and in Europe generally—indeed there was everywhere a silent conspiracy of folly and inhumanity—in the first half of the eighteenth century and, in truth, almost to the beginning of the next. We have observed the multiplication of capital penalties, the ruthless indiscriminate infliction of death for comparatively small delinquencies, the brutal application of torture, the extortion of “confessions” from the innocent, the employment of secret accusations, the disabilities imposed on the accused in regard to their defence and their evidence, the multiplicity of jurisdictions, the arbitrary authority of magistrates, the unfitness of judges and their venal offices, the scanty evidence accepted against those charged with heinous crimes, and the mechanical construction of “proofs” from that which was hearsay, irrelevant and immaterial, the branding, burning, breaking on the wheel, the horrors of incarceration, the promiscuous huddling together of prisoners, and all the rest of the diabolical catalogue. Now the Encyclopædists were among the foremost and the most persistent to rise against all this. They appealed to reason, to utility, to humanity. They showed that it was the height of unreason, that it was indeed a downright suicidal policy on the part of the governing authorities to give way indifferently, blindly to such measures of ferocity and cruelty. They warned governments that men had suffered these abuses already too long; they counselled and urged them to adopt more reasonable and equitable means so as to prevent the cataclysm that would otherwise inevitably ensue.

And they did not stop at repudiation in general terms. Their critical disquisitions and pronouncements go into details—social, sociological, biological, economic, political, philosophic. They are, for the most part, determinists; in the face of the prevailing dogmatic assumptions, they question or deny the existence of free-will, and apply this doubt or denial, as the case may be, to the consideration of criminal acts. But they do not jump to the conclusion that a malefactor, not possessing full freedom, is to be excused; for they admit that a law and its sanction may well operate on the minds of those subject thereto. “On aurait tort de prétendre,” observes D’Alembert,¹ “que, si nous ne sommes pas libres, il faudrait anéantir les lois; dans ce cas, les lois et les peines qu’elles imposent n’en seraient pas moins utiles au bien de la société comme un *moyen* efficace de conduire les

¹ *Éléments de philosophie*, chap. vii.

hommes par la crainte et de donner, pour ainsi dire, l'impulsion à la machine." Thus the penalties imposed and the terror they inspire constitute sanctions, which are destined to counter-balance evil thoughts and passions, that is, to check the motives that produce the crime. Accordingly, Holbach argues: "Les lois pénales sont des motifs que l'expérience nous montre comme capables de contenir ou d'anéantir les impulsions que les passions donnent aux volontés des hommes. Quelle que soit la cause (libre ou non) qui fait agir les hommes, on est en droit d'arrêter les effets de leurs actions. Que les actions soient libres ou nécessaires, la société punit les coupables quand, après leur avoir présenté des motifs assez puissants pour agir sur des êtres raisonnables, elle voit que ces motifs n'ont pu vaincre les impulsions de leur nature dépravée." ¹ And Diderot employs a similar argument. Again, the prescribing of a penalty should depend on two indispensable criteria—its utility, and its legitimacy—which are based on considerations of social interest and welfare. The great object of the legislator should be to prevent crimes, and not merely to punish them when committed. The temperament of the criminally-minded must be modified, their evil proclivities rooted out, habits of thinking and living in conformity with the general good of society inculcated. The right to punish is founded only on the natural self-preservation of society, and the means by and the extent to which it is to be applied should be determined only by the necessity of ensuring public security. "Le principal et le dernier but des peines est la sûreté de la société. Toutes les fins particulières des peines, prévenir, corriger, intimider, doivent toujours être subordonnées et rapportées à la fin principale et dernière qui est la sûreté publique." ² All presumed offences, then, of a spiritual character, such as heresy, sacrilege, blasphemy, which are not necessarily deleterious to the safety of the state, should be banished from the criminal code, for they are affairs only between God and man. "Les actes purement intérieurs ne sauraient être assujettis aux peines humaines; ces actes, connus de Dieu seul, ont Dieu pour juge et pour vengeur." ³

Further, they insisted that crimes and punishments should be clearly defined, that the rights and duties of magistrates should be specifically determined. An accused must not be

¹ *Système de la nature.*

² *Encyclopédie*, s.v. "Crime."

³ *Ibid.*

subject to arbitrary condemnation; his destiny should not be made to depend on the capricious humours of the judge; the amount of his punishment should not be left to the inscrutable discretion of the bench. "C'est une espèce de maxime que les peines sont arbitraires dans ce royaume; cette maxime est accablante et honteuse."¹ They urged, therefore, that penalties should be proportioned to offences, and made, as far as reasonably possible, analogous to them; they denounced the atrocity, the uselessness, the intrinsic failure of excessive punishments. Montesquieu had already briefly shown the evil effects of excessive rigour; the Encyclopædist writers took up the argument, developed it much more fully, and reinforced their reasoning by numerous illustrations.

Apart from the criticism and doctrines of the Encyclopædists in general, the work of Voltaire in particular demands attention. The movements and strivings of the entire French world of the eighteenth century are well represented by the aspirations, the indignation, the rebellion manifested in the microcosm of his alert and indefatigable mind. In the earlier part of his career he was primarily a man of letters; afterwards he took up the weapons of the aggressive philosopher, destructive critic, and social reformer and made them penetrate far and wide. Socrates, in his defence before the Athenian judges, says: "I am that gadfly which God has attached to the state, and all day long and in all places am always fastening upon you, arousing and persuading and reproaching you." Voltaire also made his energy felt all day long and in all places; but the means used by him were more telling, more drastic than the sting of a gadfly; rather, they were now the adroit thrust of a rapier, now the unerring slash of the two-handed sword. Wit, humour, epigram, jest, irony, allusion, anecdote, eloquence, invective, passion were all brought into play, and wrought havoc among the objects of his deadly assault.

We are not here concerned, however, with his untiring warfare on intolerance, on the superstitions and abuses of the church, on the arbitrary power of political authorities, with his ever ready championing of intellectual liberty, human justice, and civic rights. A few remarks on his work relating to criminal reform must suffice.² From about 1762 to 1777 Voltaire, in a

¹ A. J. M. Servan, *Discours sur l'administration de la justice criminelle* (1766).

² Cf. E. Masmonteil, *La législation criminelle dans l'œuvre de Voltaire* (Paris, 1901); E. Hertz, *Voltaire und die französische Strafrechtspflege im 18ten Jahrhundert* (Stuttgart, 1887).

rapid succession of writings,¹ assumed an uncompromising attitude in regard to the rigorous character of penal law, the secrecy of criminal procedure, the legal despotism, the perpetration of judicial blunders, the scandalous perversions of justice. Jean Calas, a protestant of Toulouse, falsely charged by fanatical monks with the murder of his son (who had really hanged himself), "because he had contemplated conversion to catholicism," was tortured and broken on the wheel (1762). Voltaire took up the cause of the victim, obtained a revision of the trial, a declaration of the parlement at Paris of the innocence of Calas and his family, and a compensation of 30,000 livres (1765). For alleged impiety the Chevalier La Barre was tortured and beheaded (1766). Voltaire made an onslaught on the magistracy; but he failed to overpower the judicial forces which had now the French monarch on their side. (In view of our present purpose it is particularly interesting to note that an account of the death of La Barre was specially addressed by Voltaire to Beccaria, 1766.) Again, Sirven, a protestant, wrongfully accused of the murder of his Roman catholic daughter, was pronounced guilty, and accordingly his possessions were confiscated, and he was banished. After eight years the defender of Calas succeeded in getting the sentence reversed. Similarly, Voltaire intervened in the cases of Montbailli (1770), Morangiès (1772), General Lally, and others.

Voltaire condemns "la contrariété, la dureté, l'incertitude, l'arbitraire" ² of the existing criminal law. He demands uniformity of laws throughout the country—the only uniformity he

¹ The following list, taken from J. M. Quérard, *La France littéraire* (Paris, 1827-1839), represents his main writings on criminal matters:

Mémoire pour Donat Calas, etc. (Genève, 1762).

Histoire d'Elisabeth Canning et des Calas (1762).

Traité sur la tolérance à l'occasion de la mort de Jean Calas (1763).

Lettre de Voltaire à M. . . sur l'événement des Calas et autres (1765).

Relation de la mort du chevalier La Barre (à M. le marquis de Beccaria) (1766).

Commentaire sur le livre des Délits et des Peines de Beccaria (1766).

Avis au public sur les parricides impulsés aux Calas et aux Sirven (1766).

Mémoire pour Sirven (1767).

La méprise d'Arras (1771).

Essai sur les probabilités en fait de justice (1772).

Nouvelles probabilités en fait de justice dans l'affaire d'un maréchal de camp et de quelques citoyens de Paris (1772).

(Some seven writings, in connection with the Morangiès trial, of less general interest than the others.)

Fragment sur le procès criminel de Montbailli . . . (1775).

Cri du sang innocent (1775).

Prix de la justice et de l'humanité (London, 1777).

[Besides these may be mentioned several articles in the *Dictionnaire philosophique* (1764).]

² *Commentaire sur le livre des délits et des peines*.

sees is in the way men accused are regarded as condemned criminals. He assails "la jurisprudence de l'Inquisition,"¹ the secret accusation and procedure, the "monitoires" (all the more illegal as they proceed from the ecclesiastical power),² the "récolement" (re-examination of witnesses), the abuses of confrontation and confirmation.³ He advocates legal assistance for the accused, the jury system, trial by one's peers. He deprecates the attitude of the magistrate, who constitutes himself an enemy of the accused rather than his judge. And such a magistrate is usually described as a great criminalist! "Dans les antres de la chicane, on appelle grand criminaliste un barbare en robe qui sait faire tomber les accusés dans le piège, qui ment impudemment pour découvrir la vérité, qui intimide des témoins, et qui les force, sans qu'ils s'en aperçoivent, à déposer contre le prévenu; s'il y a une loi antique et oubliée, . . . il la fait revivre. Il écarte, il affaiblit tout ce qui peut servir à justifier un malheureux; il amplifie, il aggrave tout ce qui peut servir à le condamner. Son rapport n'est pas d'un juge, mais d'un ennemi."⁴ He condemns the practice of torture on every ground of utility, humanity, justice.

" Arrête, âme atroce, âme dure,
Qui veux, dans tes graves fureurs,
Qu'on arrache par la torture
La vérité du fond des cœurs.
Torture! usage abominable,
Qui sauve un robuste coupable
Et qui perd le faible innocent;
Du faite éternel de son temple,
La Vérité, qui vous contemple,
Détourne l'œil en gémissant."⁵

He attacks the system of legal proofs, which admits halves, quarters, and eighths of proofs (so that eight suspicious rumours would equal a whole proof), he shows the irrational admission of hearsay and conjectures, and reminds his contemporaries, who were attached to old laws, that the Roman law required proofs "luce meridiana clariores." He deprecates the condemnation of the "contumax"⁶ (for the absent accused may be perfectly inno-

¹ *Prix de la justice et de l'humanité*, art. xxii, § 5.

² *Relation de la mort du chevalier La Barre*.

³ *Commentaire*, etc., chap. xxiii.

⁴ *Dictionnaire philosophique*, s.v. "Criminaliste."

⁵ A passage from the *Ode à la Vérité*.

⁶ *Dictionnaire philosophique*, s.v. "Criminel."

cent). Further, he assails the judicial organisation, the multiplicity of jurisdictions (of the ecclesiastical tribunals¹ and the parlements), demands the suppression of the ecclesiastical power, the sale of judicial offices. He holds that penalties are uselessly severe, that those for offences against God (sacrilege, heresy, blasphemy)² should be abolished. But if there are to be penalties for ecclesiastical misdeeds, then let only ecclesiastical privations be imposed. A good legislation should seek to prevent crimes before thinking of punishing them. "Il vaut mieux prévenir les malheurs que de se borner à les punir."³ Hence a good system of police is indispensable. Also he is against the rigorous treatment of the suicide, and the severe penalties for the various forms of immorality. Punishments should be fixed throughout, and not left to the discretion of the judge, and they should be carefully proportioned to the offences. To impose death for small delinquencies is an absurdity and a judicial murder: "Une sentence de mort pour un délit qui ne mérite qu'une correction n'est qu'un assassinat commis avec le glaive de la justice."⁴ He reprobates the multiplicity of capital punishments, but he is not for total abolition. The death penalty should be inflicted only on the most atrocious criminals, and where there is no other means of safeguarding the life of the greatest number—"c'est le cas où l'on tue un chien enragé."⁵ It should be as much as possible replaced by penal servitude, "le travail forcé et la honte durable l'intimident plus que la potence"; it is better to utilise criminals than to destroy them. A convicted person's possessions should not be confiscated. The accused is not to be imprisoned like one found guilty; an insolvent debtor ought not to be treated like a hardened offender. "L'emprisonnement . . . doit être proportionné à l'énormité du délit dont le détenu est accusé. Faut-il plonger dans le fond du même cachot un malheureux débiteur insolvable et un scélérat soupçonné d'un parricide? Il y a des degrés à tout, des distinctions à faire dans chaque genre."⁶ Finally, he discusses the conditions and arrangements of prisons, which he condemns, among other reasons, because they are places of vice and infection.

¹ *Dictionnaire philosophique*, s.v. "Droit canonique."

² *Ibid.*, s.v. "Blasphème."

³ *Prix de la justice et de l'humanité*.

⁴ *Dictionnaire philosophique*, s.v. "Blasphème"; cf. *ibid.*, s.v. "Justice."

⁵ *Prix de la justice et de l'humanité*.

⁶ *Ibid.*

We have now seen the efforts made by Montesquieu, the Encyclopædists, and Voltaire. Beccaria himself proclaims his great indebtedness to the French philosophers.¹ (Indeed, there were some ridiculous reports of opponents who asserted that it was really the Encyclopædists who had written the *Dei Delitti*, and that they had left to the obscure Beccaria the perilous glory of publishing it in Italian.) But he was no copyist or servile disciple. As D'Alembert once wrote to him: "A man such as you has no need of a master, still less of a master like myself. You are like the Titus Curtius of Tacitus, 'ex se natus,' nor have your offspring any grandparent. A father like yourself is enough for them." His own contribution, in truth, forms part of the great European movement; but none the less it constitutes an original stream of considerable magnitude, and not merely a diverted current belonging to a foreign basin. This is apparent in the full exposition of his work given in the following chapters. Let it suffice for the present to mention one or two leading features. And here it cannot be too strongly emphasised, in order to avoid misconception as to Beccaria's relationship to the French writers, that most of their productions mentioned above appeared after the publication of his treatise; therefore he could not have derived his inspiration or his materials from them. But all of them contributed something to the general movement; and it is scarcely possible to draw hard and fast lines of demarcation by the mere circumstance of date of publication. Beccaria was influenced by some; he, in turn, influenced others; and so the wave of action and reaction proceeded in its course in the second half of the eighteenth century.

In common with the leaders of the predominating French philosophy, Beccaria bases human justice on the conception of public utility, and proclaims that the object of legislation is to lead the greatest number of men in a given community to the greatest possible happiness or to the least possible misery. The *raison d'être* of sovereign power is the establishment and protection of the public good. There is a secret force which impels us towards our well-being; and this is as fundamental in the moral world as the force of gravitation is in the material world.

¹ It appears, from the testimony of Morellet, that the *De l'esprit* of Helvétius, whom Beccaria especially singles out, did not for some time attract much attention in Italy: "Les Italiens parmi lesquels je vivais, ne s'en occupaient pas encore, quoique ce fût le pays de l'Europe où cet ouvrage devait avoir le plus grand succès, et a fini par l'obtenir." (*Mémoires*, vol. i, p. 68.)

Following Helvétius again and his brother philosophers, he holds that pleasure and pain are the great motives of sensitive beings. Thus Beccaria bases his entire penal system, teleologically, on the principle of utility and, psychologically, on the principle of the association of ideas. He follows Montesquieu (whose exposition, however, is by comparison rudimentary) in regard to his notion of proportionality between crimes and punishments. The right to punish is founded on the social contract theory. The degree of punishment is to be determined by the amount of evil actually caused by the criminal, and not by the nature of his intention. Certainty of punishment is more efficacious than severity; and so Beccaria contests the right of pardon, in that it sacrifices the safety of the public to that of an individual.¹ Again, like the French philosophers, he holds that men are born with equal capacities, and that a like education and instruction (presumably added to the effect of a like environment) would produce the same results. Like them, he believes religions to be the artifices of cunning men; and like them he would promote a sense of philanthropy and universal brotherhood. He considers that public interest must take precedence over that of the family; and, with Rousseau, affirms that the "mediocre domestic virtues" are intrinsically opposed to the exercise of public virtues, and are therefore to be held in due subjection. And so on with various other ideas that are set forth in the course of the small but pregnant treatise.

¹ It is interesting to recall that, in accordance with this principle, the French revolutionary legislators in 1791 suppressed the right of pardon that was exercised by the executive; but soon afterwards, as may be expected, it was restored.

CHAPTER III

ANALYSIS OF BECCARIA'S "DEI DELITTI" ¹

FOR the sake of unity and coherence, and for reasons of convenience generally, the substance of Beccaria's treatise, which consists of forty-two short chapters or sections, is here considerably re-arranged and presented in six divisions:

- (1) Measure of crimes and punishments.
- (2) Certainty of punishment, and the right of pardon.
- (3) Nature and division of crimes, and relative punishments.
- (4) Consideration of certain punishments.
- (5) Procedure, including secret accusations and torture.
- (6) Prevention of crimes.

It will be seen that many principles laid down and considerations of numerous questions here presented are of permanent interest; if other matters may now seem less modern, it is to be remembered that the book appeared a century and a half ago, when it was regarded as revolutionary, and that it helped enormously to bring about the improved conditions enjoyed by the civilised world of to-day.

(i) MEASURE OF CRIMES AND PUNISHMENTS

The author emphasises that he is animated solely by the spirit of frank search for truth, and that his object is to increase legitimate authority rather than to diminish it. Accordingly, he deprecates the existing barbarous legal systems, and declares that the outworn remains of old codes mixed carelessly with later ingredients are not fitted for the time and temper of his age. It is necessary, therefore, to bring the law up to date. "To this day . . . some opinion of Carpzov, some old custom pointed out by Clarus, or some form of torture suggested in terms of complacent ferocity by Farinaccius, constitute the laws, so heed-

¹ The author is here indebted to the translation by J. A. Farrer, *Crimes and Punishments* (London, 1880), but he has throughout had the original before him.

lessly followed by those who in all trembling ought to exercise their government over the lives and fortunes of men."¹ A people's customs and laws are always, in point of merit and propriety, a century behind its actual enlightenment.² He urges, therefore, that the existing conditions are intolerable, and calls for comprehensive and drastic reform. Hitherto laws have usually been not conventions between free men, based on the interest of the public at large, but rather the instrument of the passions of a few, or the result of some fortuitous and temporary necessity. Everywhere, cruelty of punishments and irregularities of procedure abound; yet scarcely ever in almost the whole of Europe have these fundamental matters of criminal legislation been called into question. "The groans of the weak, sacrificed to the cruelty of the ignorant or to the indolence of the powerful; the barbarous tortures, multiplied with a severity as useless as it is prodigal, for crimes either unproved or quite chimerical; the filth and horrors of prisons, added to uncertainty, the cruellest tormenter of the miserable—all these ought to have roused rulers whose business it is to guide mankind." Too long has all this legalised and cold-blooded atrocity gone on.³

There are three sources of the moral and political principles that govern mankind: revelation, natural law, social conventions. Hence, there are three kinds of virtue and vice: religious, natural, political. These ought never to conflict, though the obligations and other consequences that flow from any one of them do not necessarily proceed from the others. Of these, the idea of political virtue is variable, since the criterion is social necessity and utility which depends itself on the circumstances of time and place.⁴ The ever predominating principle should be the greatest happiness shared by the greatest number—"la massima felicità divisa nel maggior numero." ■ Injustice and errors are due to—among other causes—the false ideas of utility

¹ *To the Reader.*

² § 6. It is almost a commonplace that superstitions and errors die hard. Thus—to give but one contemporary example—the cultured Blackstone, though he had to some extent modified his views in his fourth volume (1769) as ■ result of Beccaria's doctrines, yet devoutly believed in witchcraft: "... The thing itself is a truth to which every nation in the world hath in turn borne testimony, either by examples seemingly well attested, or by prohibitory laws which at least suppose the possibility of commerce with evil spirits."

³ § 1.

⁴ The author here warns the reader that if he confines his attention to conventional law, he is not on that account to be deemed to hold principles contrary to natural law or revelation.

⁵ § 1.

entertained by legislators. It is a false idea of utility that pays more heed to the convenience of individuals than to that of the public, or that divorces the good of society at large from that of every constituent member. It is a false idea of utility to tyrannise over men's feelings, instead of arousing them to activity, or to enslave reason, or to sacrifice a thousand real advantages for one imaginary or trifling drawback, to interfere with the liberty of the innocent and subject them to vexations, which only the guilty deserve. It is a false idea of utility that seeks to impart to a multitude of intelligent beings the symmetry and regularity that only brute and inanimate matter admits of, or that neglects man's present motives.¹

To divert the despotic will of the individual from replunging the laws of society into their primitive chaos, sensible motives ("sensibili motivi") are needed. These are supplied by the prescription of punishments in positive laws. The force therein implied is not contrary to right and justice; for the latter are themselves determined by the necessity of preserving the social bond.² The legislator, representing society, can alone make the laws; and it is for the magistrate only to decide whether they have been violated.³

The law must be certain and invariable, and is not to depend on the caprice or temper of the judge. The existence of censors and arbitrary magistrates shows that the constitution of the state is defective.⁴ Nothing is more dangerous than the common maxim, "We must consult the spirit of the law" ("Bisogna consultare lo spirito della legge"). Every man has his own particular point of view, varying with the circumstances; so that the "spirit of the law" would mean, in practice, the result of good or bad logic on the part of a judge, of his good or bad digestion; it would depend now on the violence of his passions, now on the condition of the accused, on the relationship between the judge and the complainant, or on all those minute forces that alter the appearance of things in the fluctuating mind of man. Judges, therefore, must consult only the constant and invariable voice of the law, and must not be allowed to resort to their own unstable and erring interpretations. The code of laws is to be fixed; the law is to be drawn up in the vernacular, free from obscurity, and made known to the public at large; otherwise citizens cannot acquire a consciousness of personal security,

¹ § 38.² § 2.³ § 3.⁴ § 33.

which is so essential to social life. "Ignorance and uncertainty of punishments lend assistance to the eloquence of the passions."¹ "Every citizen ought to know when his acts are guilty or innocent."²

The true measure of crimes is the injury done to society, and not the intention of the delinquent. For intention depends on actual impressions and previous mental disposition, which vary in all men, and in each man with his changing ideas, feelings, and circumstances. Nor is crime to be measured by the rank or position of the injured person, or the sinful character of the act; offences that concern God and do not endanger public security should be left to God.³

The object of punishment is not merely to inflict pain on the offender or to undo a crime already committed. It is simply to prevent the malefactor from injuring anew his fellow-citizens, and to deter others from committing similar offences.⁴ As it is thus to be a visible example to others, it is wrong to transport offenders to a distant country, and keep them among innocent people who need no example.⁵

Such punishments and such method of inflicting them should be chosen as, duly proportioned to the offence, will produce a more efficacious and lasting impression on the minds of men, and inflict the least pain on the body of a criminal.⁶ The true proportion is obtained when the evil of the punishment just exceeds the advantage of the crime; and to ensure such excess the certainty of the punishment and the loss of the possible advantage from the crime must be taken into consideration.

¹ §§ 4, 5.

² § 33.

³ § 24.

⁴ § 15. Cf. Seneca, *De ira*, i, 19: "Nemo prudens punit quia peccatum est, sed ne peccetur. Revocari enim praeterita non possunt, futura prohibentur." Cf. *ibid.*, ii, 31. In connection with the passage cited Seneca refers to Plato, and must have had in mind *Protag.* 324: "No one punishes a malefactor under the notion, or for the reason, that he has done wrong,—only the unreasoning fury of a beast acts in that way. No, he that would inflict rational punishment does not retaliate for a past offence, which cannot be undone; he has regard to the future, and desires that he who is punished and those who have witnessed his punishment may be deterred from offending thereafter." See also Plato, *Laws*, xi, 934: "Not that he is punished because he did wrong, for that which is done can never be undone, but in order that in future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evil-doing."—To the same effect writes Hobbes: "In revenges or punishments men ought not to look at the greatness of the evil past, but the greatness of the good to follow, whereby we are forbidden to inflict punishment with any other design than for the correction of the offender and the admonition of others." We may also recall the judicial observation: "We do not hang you because you stole a horse, but that horses may not be stolen."

⁵ § 19.

⁶ § 15; cf. § 19.

All beyond this is superfluous, and therefore useless and tyrannical.¹ Men regulate their conduct by the reiterated impression of evils they know, not by reason of evils they ignore.² Punishments should be proportioned not only to one another and to crimes in point of force, but also in the mode of their infliction.³ If the same penalty be attached to a greater and to a lesser crime, the greater will involve no stronger restraining motive than the other. Thus a would-be delinquent seeing the same punishment of death inflicted for murder and for killing a pheasant will draw no distinction between such crimes; in this way moral sentiments, the product of many ages and of much bloodshed, the slowest and most difficult attainment of the human mind, will be destroyed.⁴ Of course, mathematical precision in graduation is impossible. It will suffice to mark out the principal divisions in the scale of crimes and punishments. But legislators must beware that the proper order of these be not inverted, and that penalties applicable to crimes of the first degree be not assigned to those of the last.⁵ As far as possible punishment should conform to the nature of the crime in order to emphasise more forcibly the inseparable association of a misdeed with its penalty. Such analogy facilitates the contrast that ought to exist between the impulse to commit the offence, and the counter-influence of the prescribed punishment.⁶ Laws marked by cruelty and ferocity violate the "greatest happiness" principle, and are contrary to the very object of preventing the commission of crimes.⁷ The greater the cruelty of punishments the more do minds, adapting themselves to circumstances, become callous; "and the ever living force of the passions brings it about that after a hundred years of punishments, the wheel frightens men only just as much as at first did imprisonment." The very rigour of a penalty induces men all the more to escape it, and so to commit several crimes to avoid the punishment of the first. The spirit of ferocity that guides the hand of the law-giver is reflected in that of the assassin. Further, severity of punishments prevents their being duly proportioned to the different offences, and sometimes gives rise to impunity. The scale of penalties ought to be relative to the condition of a nation; advancing civilisation

¹ § 15.² § 15.³ § 19. Cf., again, Plato, *Laws*, xi, 934: "Having an eye to all these things, the law, like a good archer, should aim at the right measure of punishment, and in all cases at the deserved punishment."⁴ § 23.⁵ § 23.⁶ § 19.⁷ § 3; cf. § 1.

brings greater sensibility, and this demands appropriate relaxations throughout.¹ Finally, punishments should be the same for the greatest citizen as for the humblest. If it be said that a certain punishment imposed equally on a noble and on a commoner is not really the same by reason of their different education and of the disgrace spread over an illustrious family, the answer is that the measure of punishment is not the sensibility of the particular delinquent, but the public injury, and that this is all the greater when committed by a man placed in more favourable circumstances.²

(ii) CERTAINTY OF PUNISHMENT—PARDON

Promptness of punishment is indispensable. Justice and utility are the better served, the more speedily the penalty follows, and the more closely it is connected with the crime. It is more just, as the criminal is thereby spared useless torments of suspense. Hence the trial should be as expeditious as possible, and the verdict pronounced without delay, so that the prisoner's intervening custody may be as brief as circumstances will permit. And his confinement should be no stricter than is needed for preventing his escape, or for guarding against the concealment of proof. Promptness of punishment is more useful, for the close sequence establishes the association of the ideas of misdeed and penalty; and association of ideas is the cement of the whole fabric of the intellect. Thus in "rough and common minds," the seductive idea of an advantageous crime will be counter-balanced by the associated idea of the attached penalty.³

The certainty, the infallibility of punishment is a more effective deterrent than rigour and cruelty. Hence the vigilance of magistrates and the inexorable character of judges must, in order to be esteemed virtues, be coincident with a mild system of laws. For a moderate punishment, if certain, makes a stronger impression than a severe punishment, if attended with the hope of impunity, by reason of the clemency of prosecutor, judge, or jury.⁴

The custom of releasing a man from the punishment of a minor offence when the injured person pardons him is, no doubt, in accordance with mercy and humanity, but is contrary to public policy. A private citizen may not remit the necessity of the

¹ § 15.

² § 27.

³ § 19.

⁴ § 20.

example, as he may excuse the reparation for the injury done to him. The right to punish rests with the entire community, or the sovereign, and not with any individual; hence an individual may renounce only his particular portion of that right, but not annul that of all the rest.¹

As punishments become milder, clemency and pardon become less necessary. Indeed, a perfect system of legislation, where punishments are moderate and procedure is regular and expeditious, would have no room for mercy—the virtue that has sometimes made up in a sovereign for all his other failings. In any case, clemency is the virtue of the maker, not of the executor, of the law. When men perceive that crime may be pardoned, and that punishment is not its inseparable concomitant, the hope of impunity is encouraged, and the belief is established that convictions, which may be remitted and are not, are capricious exhibitions of violence rather than impartial emanations of justice.² Therefore let the law and its administrators be inexorable, but the law-maker mild, humane, and merciful. Let the legislator in his aim to promote the general interest see that it is the sum of the interests of each; he will then no longer be constrained to separate at every moment, by partial laws and violent remedies, the public welfare from that of individuals, and to erect the semblance of public security in fear and mistrust.³

It follows from these considerations that asylums of refuge are unjustifiable. There should be no spot within the territory of any state independent of the law. Between right of asylum and impunity little difference exists. Since the effective influence of punishment lies more in its inevitability than in its violence, asylums do more to invite to crimes than punishments do to deter from them.

The place of punishment should be the place of the crime. If an alien of bad character is an object of fear, he may be expelled. “But whether the international extradition of criminals be useful, I would not venture to decide, until laws more in conformity with the needs of humanity, until milder penalties, and until the emancipation of law from the caprice of mere opinion, shall have given security to oppressed innocence and hated virtue, until tyranny shall have ceased.”⁴ “Is it expedient to place a

¹ § 20.

² Reference is made elsewhere to the influence Beccaria's argument exercised on the revolutionary legislators in France.

³ § 20.

⁴ § 21.

reward on the head of a known criminal, and to make of every citizen an executioner by arming him against the offender? Either the criminal has fled from his country or he is still within it. In the first case the sovereign encourages the commission of a crime and exposes its author to a punishment, being thereby guilty of an injury and of a usurpation of authority in the dominions of another, and authorising other nations to do the same by himself. In the second case the sovereign displays his own weakness, for he who has the power wherewith to defend himself seeks not to purchase it. Moreover, such an edict upsets all ideas of morality and virtue, which are ever ready to vanish from the human mind at the very slightest breath. Now the laws invite to treachery, and anon they punish it; with one hand the legislator tightens the bonds of the family, of kindred, and of friendship, whilst with the other he rewards whosoever violates and despises them; always in self-contradiction, he at one moment invites to confidence the suspicious natures of men, and at another scatters mistrust broadcast among them. Instead of preventing one crime, he causes a hundred. These are the resources of weak nations, whose laws are but the temporary repairs of a ruined building that totters throughout. In proportion as a nation becomes enlightened, good faith and mutual confidence become necessary, and tend ever more to identify themselves with true policy. . . . Laws which reward treachery and stir up clandestine hostility by spreading mutual suspicion among citizens, are opposed to this union of private and public morality, a union which is so necessary, and to the observance of which individuals might owe their happiness, nations their peace, and the world a somewhat longer period of quiet and repose from the evils which at present pervade it." ¹

In the case of minor and obscure offences, however (but not heinous ones), the principle of "prescription" may be allowed to operate with no disadvantage to the state. In the first place, the obscure circumstances of the misdeed, and the lapse of time, will prevent the offender's impunity from being taken as an example; secondly, the uncertainty of his fate being removed, he will meantime be afforded opportunities to reform.²

¹ § 22.

² § 13.

(iii) NATURE AND DIVISION OF CRIMES, AND RELATIVE PUNISHMENTS

There are three classes of crimes: first, acts tending directly to the subversion of society, or of the sovereign representing it; secondly, acts injuring individual subjects in respect of their life, property, or honour; thirdly, acts contrary to the positive or negative obligations which bind every individual to the public weal.¹

Any act outside these limits can be called a crime or punished as such only by those who find it their interest to do so.

The principle that every citizen may do whatever is not forbidden by the law, without fear of any consequence other than that which may arise from the act itself, should be as inviolable as that of the incorrupt guardianship of the law. Failing this, there can be no legitimate society. It is such freedom that produces liberal and vigorous souls and enlightened minds, that instils into men the virtue that can resist fear, and not that flexible kind of prudence worthy only of a man who can endure a precarious existence.²

The uncertainty of these limits has produced in divers nations ethical systems contrary to their jurisprudence, many legal systems at variance with one another, and a number of laws exposing even the wisest man to severe penalties. Hence the significance of virtue and vice has become vague and variable; and because of the uncertain conditions thus surrounding human life, a fatal apathy has spread over political communities. "Who-soever will read with a philosophical eye the codes and annals of different nations will find almost always that the names of *virtue* and *vice*, of *good citizen* and *criminal*, are changed in the course of ages, not in accordance with the changes that occur in the circumstances of a country, and consequently in conformity with the general interest, but in accordance with the passions and errors that have swayed different legislators in succession. He will often observe that the passions of one age form the basis of the morality of later ones; that strong passions, the offspring of fanaticism and enthusiasm, weakened and, so to speak, gnawed away by time (which reduces to a level all physical and moral phenomena) become little by little the prudence of the age, and a useful instrument in the hand of the strong man and the clever,

¹ § 25.² § 25.

In this way the vaguest notions of honour and virtue have been produced; for they change with the changes of time, which causes names to survive things."¹

Of the crimes falling within the suggested divisions, high treason is the worst because it is the most injurious to society.² The next class includes offences against personal security and individual liberty. Injuries to a man's person should be punished by corporal penalties. And here the offending noble or magistrate must be equally subject to the law with the common robber or assassin. Neither the high in rank nor the wealthy ought to be able to pay a price for injuries done to the feeble and the poor; else riches which, under the protection of the laws, are the prize of industry, become the nourishment of tyranny. "Whenever the laws suffer a man in certain cases to cease to be a *person* and to become a *thing*, there is no liberty; for then you will see the man of power devoting all his industry to gather from the numberless combinations of civil life those which the law grants in his favour. This discovery is the magic secret that changes citizens into beasts of burden, and in the hand of the strong man forms the chain wherewith to fetter the actions of the imprudent and the weak. This is the reason why in some governments, that have all the semblance of liberty, tyranny lies hidden or insinuates itself unforeseen in some corner neglected by the legislator, where insensibly it gains force and grows. . . . Men oppose the strongest barriers against open tyranny, but they see not the imperceptible insect which gnaws them away, and makes for the invading stream an opening that is all the more sure by very reason of its concealment from view."³

Injuries affecting a man's honour should be punished with disgrace. The inadequate legal protection of honour, though there are difficulties in determining its significance, gives rise to duels. The best way to prevent these is not so much to threaten the acceptor of a challenge—for fear of punishment will scarcely prevail over the fear of being disgraced and regarded with contempt by his fellows—as to punish the aggressor, that is the one who provokes the duel, and to declare the innocence of the injured party.

Next as to offences against property. The appropriate punishment for larceny would seem to be a fine, on the ground that he who enriches himself at another's expense ought to suffer at his

¹ § 25.² § 26.³ § 27.

own. But as theft is generally the crime of wretchedness and despair, which would only be aggravated by pecuniary penalties, the most fitting punishment will be the temporary servitude of a man's person and his labour by way of compensation to society. If theft is accompanied by violence, the penalty should be a combination of corporal and servile punishment.¹ Smuggling, when it incurs no disgrace in public opinion, ought not to be punished with disgrace. The most just penalty is that of losing both the prohibited goods and whatever effects are found with them; and its efficiency will obviously be greater in proportion as the import duty is lower. Where the smuggler has no effects to lose, he may be punished by imprisonment or servitude, not in the same way as the assassin or the thief, but by limiting his labour to the service of the very treasury he wished to defraud. Thus will the punishment be most conformable to the nature of the offence.² Fraudulent insolvent debtors ought to receive the same punishment as that imposed on false coiners, since it is as great a crime to falsify obligations as to issue counterfeit coin, which is the pledge of such obligations. It is simply barbarous, however, to throw the innocent bankrupt into prison.³ Provisions may be made for enforcing the ultimate payment in full to the creditors; but can the deprivation of his liberty be of any use whatever in the interests of commercial intercourse or of the right of property? It is well to distinguish here between fraud, gross negligence, slight negligence, and innocence, and to graduate the penalties accordingly. But such distinctions should be fixed by the law, not by the dangerous and arbitrary wisdom of a judge. Much may be done to prevent a good deal of culpable bankruptcy, and relieve the misfortunes of the industrious and innocent, e.g. by causing contracts to be registered and allowing interested parties to inspect them, by establishing a public bank with funds got from wisely apportioned taxes on prosperous commerce, and intended for the relief of any unfortunate and deserving citizen. "But easy, simple, and great laws which await but the signal of the legislator, in order to disseminate riches and strength through a nation, are either the

¹ § 30.

² § 31.

³ In a footnote, Beccaria says that in the first edition he suggested that an innocent bankrupt ought to be kept guarded in pledge of his debts or employed as a slave to labour for his creditors. "I am ashamed of having so written. I have been excused of irreligion without deserving to be, and I have been accused of sedition without deserving to be! I offended the rights of humanity, and no one reproached me for it!"

least thought of or the least desired of all. An uneasy and petty spirit, the timid prudence of the present moment, and a circumspect stiffness against innovations, master the feelings of those who govern the complex actions of mankind."¹

Among the offences of the third class are especially those against the public peace and civic tranquillity. Here effective police organisation—not according to the directions of arbitrary power but depending on a regularly established and public code—will be the best preventive.²

Two or three offences demand special consideration. Suicide is a crime for which punishment proper seems inadmissible. It is a fault which should be left to the justice of God. Self-slaughter is a less evil to society than permanent departure from the country; for in the former case the substance of the deceased remains within his own state, in the latter it is transported to foreign territory. But it is both useless and unjust to make a prison of the state. The best way to keep men in their country is to augment the relative welfare of each of them.³ Again, there are certain crimes difficult to prove, e.g. adultery, pederasty, infanticide, which call rather for preventive measures than for indiscriminate punishment. "Where marriages are governed by hereditary prejudices, or bound or loosened by parental power, there the chains are broken by secret intrigue, in despite of ordinary morality which, whilst conniving at the causes of the offence, makes it its duty to declaim against the results."⁴ In general, the penalty attached to a misdeed, which by its nature frequently escapes punishment, constitutes an additional incentive thereto. "It is a quality of our imagination, that difficulties, if they are not insurmountable or too difficult, relatively to the mental energy of the particular person, excite the imagination more vividly, and place the object desired in larger perspective; for they serve, as it were, as so many barriers to prevent an erratic and flighty fancy from quitting hold of its object; and while they compel the imagination to consider the latter in all its bearings, it attaches itself more closely to the pleasant side, to which our mind most naturally inclines, than to the painful side, which it places at a distance."⁵ In the case of infanticide, the most effective way of preventing it "would be to give efficient legal protection to weakness against tyranny, which exaggerates those vices that cannot be hidden by the cloak of virtue." In

¹ § 32.² § 33.³ § 35.⁴ § 36.⁵ *Ibid.*

conclusion Beccaria adds: "I do not pretend to diminish the just wrath these crimes deserve; but in indicating their sources, I think myself justified in drawing one general conclusion, and that is, that no punishment for a crime can be called strictly just—that is, necessary—so long as the law has not adopted the best possible means, in the circumstances of a country, to prevent the crimes it punishes." ¹

(iv) SOME PUNISHMENTS CONSIDERED

Infamy, as a mark of disapprobation, depriving a delinquent of the good-will, sympathy, and confidence of his fellow-citizens, ought to depend not merely on the laws, but also on public ideas of morality and honour. In certain cases, Beccaria would urge, the ban of public opinion might be more appropriate and effective than the fixed sanctions of positive law. But careful discrimination is of the utmost importance; for whosoever pronounces actions to be infamous that are in themselves indifferent, detracts from the infamy of actions that are intrinsically infamous. For offences having their foundation in pride and drawing from pain itself their glory and nutriment, ridicule and infamy are more fitting penalties than corporal or other physically painful punishments.

We must not make use of such a public stigma too frequently, or allow it to fall upon too many persons at a time; for its frequency would weaken the force of public opinion, and the disgrace of many would resolve itself into the disgrace of none.²

Banishment is a legitimate mode of dealing with those who disturb the public peace or disobey the laws. It may well be employed in the case of those accused of an atrocious crime, whose guilt is probable but not certain; so that the sacred right of establishing his innocence is left to him. (It is remarkable that the writer, who so strongly denounces the aberrations of criminal procedure and evidence and condemns the abuses of the right of asylum, proposes this measure where a clear conviction cannot be obtained.) Should an exile be also deprived of his property? In certain circumstances, the whole or part or none of a man's property should be taken away, as the case may be, according to the nature of his crime. But such property should pass to his lawful heirs rather than to the sovereign. It has been held by some (says Beccaria) that confiscation has operated

¹ § 36.

² § 18.

as a check on acts of vengeance and on the great power of individuals; they have, however, neglected to consider that whatever good may be effected by punishment, it is not for that reason alone just, for to be just it must also be necessary. A legislator desirous of closing all doors against tyranny, cannot tolerate expedient justice. Indiscriminate and absolute confiscation of property places a price on the heads of the feeble, causes the innocent to suffer the punishment of the guilty, and makes the perpetration of crimes a desperate necessity even for the innocent.¹

In regard to the question of capital punishment the name of our author will ever be remembered. He was the first noteworthy writer to contest the very legitimacy of the death penalty. In that respect his point of view is markedly different from that of his contemporaries, and dissociates him even from reforming spirits like Montesquieu, Voltaire, Rousseau, Diderot, whom he regarded as his masters. Montesquieu—the worthy magistrate—holds that the death penalty is just, if imposed by the law; for a culprit cannot complain of suffering a punishment at the hands of society which has conferred advantages on him and has given him protection. Rousseau observes that the delinquent violating the social compact puts himself outside the law, and returns to the primitive state of war, the very object of which is to inflict death, “attendu que la vie d’un citoyen n’est pas seulement un don de la nature, mais aussi un bienfait conditionnel accordé par l’État”²—a strange assertion by one who had maintained that a captured enemy could not legitimately be put to death, if it was possible to keep him in slavery.³ Beccaria’s firm attitude is conspicuously opposed to the tendencies of his time, when more and more offences were everywhere made capital, when men’s lives were taken without compunction, and almost at random.

By what kind of right, asks Beccaria,⁴ do men slaughter their fellow-beings in cold blood? Certainly not by the right that is the source of sovereignty and the laws, which are but the totality of the smallest portions of individual liberty, and represent the general will, that is, the aggregate of individual wills. A man is not the creator of his own life; hence it is beyond his power to assume to himself or to confer on society the right to take it away. The infliction of the capital penalty, therefore, is not

¹ § 17.

² *Ibid.*, liv. i, chap. iv.

³ *Contrat social*, liv. ii, chap. v.

⁴ § 16.

based on an undoubted right; at most it is of the nature of a war made by a nation against one of its members, on the ground that his destruction is deemed necessary and expedient. But his death is neither necessary nor expedient. The death of a citizen can be deemed necessary or just only for two reasons: first, when his existence threatens a dangerous revolution in the form of government established by the wishes of a united nation, and secondly, when the taking of his life is the only effective measure possible to deter others from committing crimes.

Now history everywhere shows that the prescription of this supreme penalty has never thus diverted the passions of desperate men. The idea of the duration of a punishment has a more potent influence on the mind of a would-be malefactor than that of its brief intensity; human sensibility is more easily and enduringly affected by slight but repeated impressions than by a stronger but briefer shock. "The mind of man offers more resistance to violence and to extreme but brief pains, than it does to time and incessant weariness; for whilst it can, so to speak, gather itself together for a moment to repel the former, its vigorous elasticity is insufficient to resist the long and repeated action of the latter."¹ "Very many men face death calmly and firmly, some from fanaticism, some from vanity, which almost always attends a man to the tomb; others from a last desperate attempt either no longer to live or to escape from their misery." ² The thief or the assassin, face to face with the supreme sanction, sometimes reasons thus: "Of what sort are these laws that I am bound to observe, that leave so great an interval between myself and the rich man? He denies me the penny I ask of him, and excuses himself by ordering from me a work of which he himself knows nothing. Who has made these laws? Were they not made by rich and powerful men, who have never deigned to visit the wretched hovels of the poor, who have never divided a musty loaf of bread amid the innocent cries of famished children and the tears of a wife? Let us break these bonds, which are fatal to the greater number, and only useful to a few indolent tyrants; let us attack injustice in its source. I will return to my state of natural independence; I will live for some time happy and free on the fruits of my courage and address; and if the day should ever come when I have to suffer and repent for it, the time of suffering will be short, and I shall have one day

¹ § 16.

² *Ibid.*

of misery for many years of liberty and pleasure. . . ."¹ And this brief moment of misery is further compensated by religion which, by offering him an opportunity for a facile repentance and the balm of consolation, does much, for him as for those contemplating his fate, to diminish the horror of the final tragedy.

"Capital punishment becomes a spectacle for the majority of mankind, a subject for compassion and abhorrence for others; the minds of the spectators are more filled with those feelings than with the wholesome terror the law pretends to inspire. . . . The limit that the legislator should affix to the severity of penalties appears to lie in the first signs of a feeling of compassion becoming uppermost in the minds of the spectators, when they look upon the punishment rather as their own than as that of the criminal." ² Now moderate and continuing penalties inspire men rather with fear of the law than with compassion for an executed victim. So that, in that respect, penal servitude is preferable to capital punishment. But there are more vital reasons in its favour. It is in reality, as the above considerations indicate, a greater deterrent than death. It is even a more painful punishment. It offers to others an ever-present example. It impresses more effectually than the sight of a momentary punishment, which from its very nature tends rather to harden than to correct. It has more terrors for those who see it than for him who suffers it; for the former think of the whole sum of unhappy moments to be borne, whilst the latter, through the unhappiness of the present moment, has his thoughts diverted from what is to come. All evils are magnified in the imagination of spectators who, in considering a given punishment, have a tendency to substitute their own sensibility for the more hardened disposition of a criminal. The example of barbarity presented by the legalised shedding of human blood, surrounded as the operation is by gruesome formalities, is subtly injurious to the interests of the nation at large. "To me it seems an absurdity, that the laws, which are the expression of the public will, which abhor and which punish murder, should themselves commit one; and that, to deter citizens from private assassination, they should themselves order a public murder." Capital punishment, then, is not absolutely necessary. "Men in their most secret hearts have ever believed that their lives lie at no one's disposal, save at that of necessity alone, which, with its iron sceptre, rules the universe."

¹ § 16.

² *Ibid.*

Only those are true and useful laws that do not alienate the minds of numbers of subjects, that unite and identify their own particular interests with those of the commonwealth. Again, capital punishment is not just. In order that a punishment may be just it must be susceptible of graduation conformably to the amount of atrocity in the offence committed, and should contain only such a degree of intensity as will suffice to deter men from criminal acts. Now penal servitude fulfils these requirements, and consequently from the point of view of reason, public policy, and the object desired it ought to supersede the capital penalty.

It is not a valid argument to say that the great antiquity of an institution necessarily justifies its continued existence. We must weed out those things which, in conformity with the conceptions and needs of a progressive civilisation, are not demanded by necessity, are repugnant to reason and justice, are contrary to public utility. "If I am confronted with the example of almost all ages and almost all nations that have inflicted the punishment of death for some crimes, I will reply that the example avails nothing before truth, against which there is no prescription of time; and that the history of mankind conveys to us the idea of an immense sea of errors, among which a few truths, confusedly and at long intervals, float on the surface. Human sacrifices were once common to almost all nations, yet who for that reason will dare defend them? . . . The voice of a philosopher is too feeble against the noise and cries of so many followers of blind custom, but the few wise men scattered over the face of the earth will respond to me from their inmost hearts. . . ." ¹

In 1790, that is about a quarter of a century after the publication of the *Dei Delitti*, Beccaria sat on a commission appointed to recommend reforms in the penal system of Lombardy.² On the question of capital punishment the opinions of the commissioners were somewhat diverse and contradictory. The minority report was presented by Beccaria, Scotti, and Risi, who suggested the almost entire abolition of the death penalty, and the substitution of penal servitude with greater or lesser severity according to the gravity of the offence. They pointed out that the maintenance of executions was justifiable only in case of absolute necessity, which would arise, for example, when the mere imprisonment of a treasonable criminal would still give him opportunities

¹ § 16.

² Cf. Cantù, *op. cit.*, appendix F.

to imperil the pacific state of society and the regular administration of justice. Further, in case of open sedition, a culprit might then and there be put to death; but this would not strictly be a juridical application of a penalty, but rather a necessity of war. Apart from these exceptional cases, they urged that the death penalty was not to be retained. And of the three reasons given, two recall precisely the arguments of Beccaria, the third being a new consideration not expounded in our author's treatise. The death penalty, then, should be abrogated, subject to the exception stated, because, in the first place, not being necessary it is not just; secondly, it is not the most efficacious deterrent; and thirdly, it is irreparable.

With regard to its necessity. In order that a penalty may be just, its intensity ought not to exceed the degree necessary to turn men away from offending. Whatever benefits the commission of a crime may be thought to produce, no man would be ready to expose himself to perpetual loss of liberty. Penal servitude for life is really deemed to be more terrible than death. Before capital punishment can be considered necessary and its exemplarity thought sufficient to restrain the gravest offences, it is indispensable to demonstrate by actual facts that, where it has been most frequently applied, such crimes have been less numerous than in countries where it is rarely or never inflicted. On the contrary, say the three commissioners, in examining past and present records they find that where penalties have been the most moderately, but also the most surely, applied, leaving no offence whatever unpunished, there crimes have been less frequent.

Similarly, as to the question of efficacy. The criterion is less the severity of the penalty than its inevitability, provided it is proportioned to the offence. The strongest restraining influence is found not in the transitory spectacle of a wretch's death, but in the permanent example of his long penal servitude, compelling him to repair as much as possible his injury to society. Men do not by any means regard death always as the greatest terror. Further, the capital penalty cannot be graduated in accordance with the number and atrocity of the crimes committed. To impart a greater exemplary effect to imprisonment it is also suggested that prisons should not be placed in distant regions, but should be built in every town, and classified according to the prisoners' criminality and other important considerations.

Lastly, the irreparable character of capital punishment is a particularly powerful argument against it. The proof of guilt is not always perfect; men's evidence and inferences are liable to error. The statements of witnesses and the numerous presumptions often amount only to "moral certainty," which constitutes at most nothing more than probability. But between probability and certainty there is frequently a wide gulf. Among all nations there are many cases of the execution of men who were subsequently shown to be innocent, in spite of the fact that the proof had previously been held irrefragable. It may be said, the commissioners observe, that this danger equally applies to the one case in which the capital penalty is allowed. But here, they point out, they are placed between two opposing necessities: on the one hand, to protect the state from imminent danger of subversion, on the other, to run the distant risk of condemning an innocent man to death; and of the two alternatives, they are compelled to adopt the second, being the less evil.

(v) PROCEDURE.—SECRET ACCUSATIONS. TORTURE

It has already been shown what a great part secret accusations, "lettres de cachet," and similar arbitrary proceedings played in the administration of criminal law in the eighteenth century. With regard to the entire baneful procedure Beccaria took up a decisively hostile attitude. In a very brief but eloquent chapter¹ he condemns in uncompromising terms the practice of secret accusations. "Who can protect himself from calumny," he exclaims, "when it is armed by the strongest shield of tyranny, secrecy? . . . Had I to dictate new laws in any forgotten corner of the universe, my hand would tremble and all posterity would rise before my eyes before I would authorise such a custom as that of secret accusations."

After the arrest of an accused person, it will usually be necessary to keep him in confinement before he is brought to trial. But unless there be sufficient *prima facie* evidence, the authorities will not be justified if they keep him thus in imprisonment. And it is the law alone, and not the arbitrary pleasure of the judge, that is to determine whether or not there is adequate evidence to detain the accused. There may be more or less valid and relevant evidence in the fact of common report, in a

¹ § 9.

suspected man's flight, in a non-judicial confession, or in the confessions of an accomplice; in an accused man's threats against or constant hostility to the person injured; generally, in the various facts of the crime and the relative circumstances. But all these matters should be prescribed by the law, and not by the capricious will of the executive or judiciary. "The more punishments are mitigated, misery and hunger banished from prisons, pity and mercy admitted within their iron doors and set above the inexorable and hardened ministers of justice, the slighter will be the evidence of guilt requisite for the legal detention of the suspected."¹ It is of the utmost importance to prevent convicted persons and those merely accused from being thrown together into the same dungeon. And a man accused of a crime, imprisoned and subsequently acquitted, ought to bear no mark of disgrace.²

The principle must be firmly established that everybody is to be judged by his equals. If an offence has been committed against a person belonging to a rank different from that of the accused, one half of the jury should be the equals of the accused, the other half of the complainant; so that the private interests of the parties being balanced, by which the appearances of things are involuntarily modified, only the voice of the law and of truth may be heard. A prisoner brought before the court ought to have the right to challenge, up to a certain point, judges or jurors.

The relation of the certainty of a fact to the force of proofs may be indicated by the following general principles: "(1) When the proofs of a fact are dependent on one another, i.e. when each single proof rests on the weight of some other, then the more numerous the proofs are, the smaller is the probability of the fact in question, because the chances of error in the preliminary proofs would increase the probability of error in the succeeding ones. (2) When the proofs of a fact all depend equally on a simple one, their number neither increases nor diminishes the probability of the fact in question, because their total value resolves itself into that of the single one on which they depend. (3) When the proofs are independent of each other, the more numerous the proofs adduced the greater is the probability of the fact in question."³

The various proofs of an alleged crime may be divided into two classes—"perfect" and "imperfect." The former are such

¹ § 6.² *Ibid.*³ § 7.

as include the possibility of innocence, and the latter such as fall short of this certainty. Of the first kind, one proof alone may suffice to obtain a conviction. Of the second kind, so many are required as are sufficient to make up a single perfect proof, that is where each of the proofs taken separately does not exclude the possibility of innocence, but taken collectively they converge on the same point and indicate indubitable guilt. It may be, however, that imperfect proofs, if the accused refuses to rebut them, become perfect. The determination of the "moral certainty" of proofs should be left to a common jury chosen by lot. "There is more safety in the ignorance which judges by sentiment than in the knowledge which judges by opinion. . . . Common sense is less fallacious than the learning of a judge, accustomed as he is to reduce everything to an artificial system borrowed from his studies." Finally, all proofs of guilt should be set forth in public. Also the verdict, after it has been arrived at, should be pronounced in open court.¹

As soon as the proofs of a crime and its reality have been fully certified, the prisoner should be allowed time and opportunity for preparing his defence. The law and not the judge should fix a certain space of time for this purpose, as well as for the discovery of proofs against him.²

A condemned criminal ought to be allowed, like any other witness, to give evidence. " 'He is *dead civilly*,' say gravely the peripatetic lawyers, 'and a dead man is incapable of any action.' In support of this silly metaphor many victims have been sacrificed, and it has very often been disputed with all seriousness whether the truth should not yield to judicial formulas. . . . Forms and ceremonies are necessary in the administration of justice, because they give the people an idea of a justice which is not tumultuary and self-interested, but steadfast and regular. But such forms must not be so firmly fixed by the laws as to be injurious to truth." ³

Great discrimination should be exercised in estimating the value of evidence, according to the character and interest of the witnesses, and the particular circumstances of each case. Usually the credibility of a witness must be held to diminish in proportion to the marked hostility, on the one hand, or the close friendship, on the other, existing between him and the accused. Again—and this is much more important—the credibility of a witness

¹ § 7.² § 13.³ § 8.

is to become less the greater the atrocity of the alleged crime, or the greater the improbability of the circumstances, as, for example, in accusations of magic, gratuitous cruelty, etc. "According to the criminalists, however, the greater the atrocity of the crime the greater the credibility of the witness. Look at the iron maxim dictated by the most cruel stupidity: '*In atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi*' (In the most atrocious crimes [i.e. in the least probable] the slightest conjectures are enough, and the judge may exceed the law). Absurd legal practices are often the result of fear, which is the principal source of all human contradictions. Legislators (who are really only lawyers authorised by chance to decide about everything, and to become from interested and venal writers arbiters and legislators about the fortunes of men), alarmed by the condemnation of some innocent person, have loaded jurisprudence with superfluous formalities and exceptions, the exact observance of which would cause anarchy to sit with impunity on the throne of justice. In their fright at some crimes of an atrocious nature and difficult to prove, they thought themselves under the necessity of getting over the formalities established by themselves; and so, now with despotic impatience, now with feminine timidity, they have transformed grave trials into a kind of play, in which hazard and subterfuge act the principal part."¹

Where there are accomplices, the practice of promising impunity to one of them, if he should turn "King's evidence," has disadvantages as well as some advantages. It amounts to a national authorisation of treachery; "for crimes of courage are less pernicious to a people than crimes of cowardice, courage being no ordinary quality, and needing only a beneficent directing force to make it conduce to the public welfare, whilst cowardice is more common and contagious, and always more self-centred than the other."² Also, a court thus having recourse to the aid of the law-breaker proclaims its own uncertainty and the weakness of the laws themselves. As to advantages, the practice may, in some measure, tend to prevent crimes, and to show that he who breaks his faith to the laws, that is to the public, is likely also to violate it in private life. However, if by reason of a general law impunity should be offered in such cases, then the informer should be afterwards banished. "But to no purpose do I torment

¹ § 8.² § 14.

myself to dissipate the remorse I feel in authorising the inviolable laws, the monument of public confidence, the basis of human morality, to resort to treachery and dissimulation.”¹

One of the most noteworthy features of Beccaria's condemnation of existing methods is the firm stand he made against that part of the inquisitorial procedure involving the much abused administration of oaths to prisoners, and the infliction of torture. “The experience of all ages has shown that men have abused religion more than any other of the precious gifts of heaven; and for what reason should criminals respect it, when men esteemed as the wisest have often violated it? Why place men in the terrible dilemma of either sinning against God or concurring in their own ruin? The law, in fact, which enforces such an oath commands a man either to be a bad Christian or to be a martyr. The oath becomes gradually a mere formality, thus destroying the force of religious feelings. No oath has ever yet made any criminal speak the truth.”²

Torture is useless, wrong, barbarous; it is conducive to false conclusions, and is worse for the innocent than the guilty, for the physically feeble than the robust.

“A cruelty consecrated among most nations by custom is the torture of the accused during his trial, on the pretext of compelling him to confess his crime, of clearing up contradictions in his statements, of discovering his accomplices, of purging him in some metaphysical and incomprehensible way from infamy, or finally of finding out other crimes of which he may possibly be guilty, but of which he is not accused.”

To inflict a punishment on a citizen before his guilt has been determined is a right merely of might. . . . “Either the crime is certain or uncertain. If certain, no other punishment is suitable for it than that affixed to it by law; and torture is useless, for the same reason that the criminal's confession is useless. If it is uncertain, it is wrong to torture an innocent person, such as the law adjudges him to be, whose crimes are not yet proved. . . .

“ . . . It is to seek to confound all the relations of things to require a man to be at the same time accuser and accused, to make pain the crucible of truth, as if the test of it lay in the muscles and sinews of an unfortunate wretch. The law that ordains the use of torture is a law that says to men: ‘Resist pain; and if Nature has created in you an inextinguishable self-

¹ § 14.

² § 11.

love, if she has given you an inalienable right of self-defence, I create in you a totally contrary affection, namely, an heroic self-hatred, and I command you to accuse yourselves, and to speak the truth between the laceration of your muscles and the dislocation of your bones.'

"This infamous crucible of truth is a still-existing monument of that primitive and savage legal system, which called trials by fire and boiling water, or the accidental decisions of combat, 'judgments of God,' as if the rings of the eternal chain in the control of the First Cause must at every moment be disarranged and broken for the petty institutions of mankind. . . .

"Torture is a certain method for the acquittal of robust villains and for the condemnation of innocent but feeble men." The judge's train of reasoning may be put thus: "'I, as judge, had to find you guilty of such and such a crime; you, A.B., have by your physical strength been able to resist pain, and therefore I acquit you; you, C.D., in your weakness have yielded to it, therefore I condemn you. I feel that a confession extorted amid torments can have no force; but I will torture you afresh, unless you corroborate what you have now confessed.'

"The result, then, of torture is a matter of temperament, of calculation, which varies with each man according to his strength and sensibility; so that by this method a mathematician might solve better than a judge this problem: 'Given the muscular force and the nervous sensibility of an innocent man, find the degree of pain which will cause him to plead guilty to a given crime.' . . ."

By the use of torture, an innocent man, as he has nothing to gain, is placed in a worse position than a guilty one.

". . . A confession made under torture is considered of no avail unless it be confirmed by an oath made after it; and yet, should the criminal not confirm his confession, he is tortured afresh. Some doctors of law and some nations allow this infamous begging of the question to be employed only three times; whilst other nations and other doctors leave it to the discretion of the judge. . . .

"The second pretext for torture is its application to supposed criminals who contradict themselves under examination, as if the fear of the punishment, the uncertainty of the sentence, the legal pageantry, the majesty of the judge, the state of ignorance that is common alike to innocent and guilty, were not enough

to plunge into self-contradiction both the innocent man who is afraid, and the guilty man who seeks to shield himself; as if contradictions, common enough when men are at their ease, were not likely to be multiplied when the mind is perturbed and wholly absorbed in the thought of seeking safety from imminent peril.”¹

(vi) PREVENTION OF CRIMES

Beccaria points out that it is a useless, destructive policy for governments to busy themselves with punishing crimes, and to neglect their prevention. Laws prescribing penalties are wanting in justice if they fail to make the best provisions available in order to prevent the offences they punish. Certain classes of crime are, indeed, more easily preventable than discoverable.

“It is better,” says our author at the close of his treatise, “to prevent crimes than to punish them. This is the chief aim of every good system of legislation, which is the art of leading men to the greatest possible happiness or to the least possible misery, according to the calculations of all the goods and evils of life. But the means hitherto employed for this end are for the most part false and contrary to the end proposed. It is impossible to reduce the turbulent activity of men to a geometrical harmony without any irregularity or confusion. As the constant and most simple laws of nature do not prevent aberrations in the movements of the planets, so, in the infinite and contradictory attractions of pleasure and pain, disturbances and disorder cannot be prevented by human laws. Yet this is the chimera that narrow-minded men pursue, when they have power in their hands. To prohibit a number of indifferent acts is not to prevent the crimes that may arise from them, but it is to create new ones from them; it is to give capricious definitions of virtue and vice which are proclaimed as eternal and immutable in their nature. To what should we be reduced if everything had to be forbidden us which might tempt us to a crime? It would be necessary to deprive a man of the use of his senses. For one motive that drives men to commit a real crime there are a thousand that drive them to the commission of those indifferent acts which are called crimes by bad laws; and if the likelihood of crimes is proportioned to the number of motives to commit them, an increase of the field of crimes is an increase of the likelihood of their commission. . . .

¹ § 12.

"Would you prevent crimes, then cause laws to be clear and simple, bring the whole force of a nation to bear on their defence, and suffer no part of it to be busied in overthrowing them. Make the laws to favour not so much classes of men as men themselves. Cause men to fear the laws and the laws alone. Salutory is the fear of the law, but fatal and fertile in crime is one man's fear of another. Men as slaves are more sensual, more immoral, more cruel than free men; and, whilst the latter give their minds to the sciences or to the interests of their country, setting great objects before them as their model, the former, contented with the passing day, seek in the excitement of libertinage a distraction from the nothingness of their existence, and, accustomed to an uncertainty of result in everything, they look upon the result of their crimes as uncertain too, and so decide in favour of the passion that tempts them. . . .

"Would you prevent crimes, then see that enlightenment accompanies liberty. The evils that flow from knowledge are in inverse ratio to its diffusion; the benefits directly proportioned to it. . . . Whoever has a sensitive soul, when he contemplates a code of well-made laws, and finds that he has only lost the pernicious liberty of injuring others, will feel himself constrained to bless the throne and the monarch that sits upon it. . . .

"If blind ignorance is less pernicious than confused half-knowledge, since the latter adds to the evils of ignorance those of error, which is unavoidable in a narrow view of the limits of truth, the most precious gift that a sovereign can make to himself or to his people is an enlightened man as the trustee and guardian of the sacred laws. Accustomed to see the truth and not to fear it; independent for the most part of the demands of reputation, which are never completely satisfied and put most men's virtue to a trial; used to consider humanity from higher points of view: such a man regards his own nation as a family of men and of brothers, and the distance between the nobles and the people seems to him so much the less as he has before his mind the larger total of the whole human species.¹ Philosophers acquire wants and interests unknown to the generality of men, but that one above all others, of not belying in public the principles they have taught in obscurity, and they gain the habit of loving the truth for its own sake. A selection of such men makes the happiness of a people, but a happiness which is only transitory, unless

¹ It is Beccaria, a noble himself, who writes thus.

good laws so increase their number as to lessen the probability, always considerable, of an unfortunate choice.

“Another way of preventing crimes is to interest the magistrates who carry out the laws in seeking rather to preserve than to corrupt them. The greater the number of men who compose the magistracy, the less danger will there be of their exercising any undue power over the laws. . . .” Subjects are to be accustomed to fear rather the laws than the magistrates.

“Another way to prevent crimes is to reward virtue. On this head I notice a general silence in the laws of all nations to this day. If prizes offered by academies to the discoverers of useful truths have caused the multiplication of knowledge and of good books, why should not virtuous actions also be multiplied, by prizes distributed out of the munificence of the sovereign? . . .

“Lastly, the surest but most difficult means of preventing crimes is to improve education”—a subject that is “intimately connected with the nature of government. . . .” He points out that the kind of subjects of instruction is more important than their multiplicity, and that the people’s recognition of utility and necessity will have a greater influence on their conduct than can have “the uncertain method of command, which never obtains more than a simulated and transitory obedience.”¹

To sum up the essence of his penal doctrine, Beccaria presents the following grand conclusion: “In order that every punishment may not be an act of violence committed by one man or by many against a single individual, it ought to be above all things public, speedy, necessary, the least possible in the given circumstances, proportioned to its crime, dictated by the laws.”²

¹ § 41.

² § 42.

CHAPTER IV

BECCARIA'S INFLUENCE AND ACHIEVEMENTS

AMONG the numerous translations of Beccaria's treatise there was one (the translation of Morellet, together with Diderot's notes and the correspondence of Beccaria and Morellet) issued by Røederer, who was at the time a member of the Directory. He sent a copy in May 1798 to the late author's daughter, Giulia. In the accompanying letter Røederer points out Beccaria's own acknowledgment of the influence exercised on him by the French philosophers, and of his sources of inspiration in the composition of his work. He goes on to say that the book made a profound impression in France, where the most eminent men, such as D'Alembert, Buffon, Voltaire, and others, paid homage to it; that it did much to transform the spirit of the French criminal courts even ten years before the Revolution; that all the younger magistrates of the courts (and he himself was one of them) pronounced their judgments in conformity with the principles enunciated in that work rather than in accordance with the existing laws; that it was from the *Dei Delitti* that men like Servan and Dupaty obtained their views; and that the newly constituted penal legislation in France was much indebted to it.

It might be said, indeed, that Beccaria's small book had considerably hastened the approaching revolution in France. It became, to a large extent, a manual of the principal leaders and the ardent legislative reformers. By presenting an incisive criticism of the arrant folly and unrestrained abuse of the prevailing law and administration, by expounding the fundamental principles of a more rational, a more human jurisprudence, consistently and uncompromisingly based on necessity, justice, utility, public welfare, the work sent an astonishing ray of light into the obscure recesses of the complex mass of criminal law, and contributed much to arouse in France a spirit of dissatisfaction, and ultimately a general revolt. One of the first reforms to which the Constituent Assembly directed its attention was

the preparation of a criminal code grounded on the suggestions of Beccaria.

As will be shown presently, the work left its mark—and an indelible one, too—in many other parts of the world. It came, of course, at an opportune moment. As soon as it appeared, it was recognised by discerning minds as an unanswerable and irresistible appeal to nations, too long befogged, harassed, and devitalised as they were by their self-stultifying systems. It at once pronounced a death sentence on the existing irrational institutions, and suggested in striking outlines a plan of radical reconstruction. We must admit, however, that had it not been for the fact that the time was ripe for proposals of amelioration, and men's minds were much more eager than they were before to entertain new conceptions, it would have been difficult to explain the extraordinary influence exercised by the slender production of a young man, a stranger to the regular juridical studies, one not deeply versed in historical lore, and with no experience of criminal matters. The poet says that there is a tide in the affairs of men which taken at the flood leads on to fortune. Beccaria took the tide at the flood, and so acquired fame, if not fortune. Thus, strictly speaking, he is not—he cannot have been—an absolute originator in all parts of his discourse. The original character of his book lies rather in its terse aphoristic exposition of fundamental principles, its vivid engaging style, its avoidance of voluminous technical commentaries, its simple unified structure, within a small compass, of a series of irrefutable arguments based on universal reasons and common sense, and manifestly animated by profound feeling. To appreciate fully the importance and widespread influence of the treatise, it must be looked at in due perspective. We must remember that although it possesses permanent intrinsic interest, irrespective of time and place, it was, for the most part, a propagandist contribution; and as such it was so effective, its objects were so successfully attained, that many of the subjects it discusses now appear (apart from historical and literary interests) necessarily antiquated. For most of the reforms it advocated were almost everywhere established more or less speedily. A notable exception is, of course, in the case of capital punishment, which has, however, been entirely abolished in many countries of the world, and considerably restricted in the others. So that even here our author's influence or prevision was greater than it would at first sight appear

Let us see now what was Beccaria's relationship to the reform movement in general, and the effect on it produced by his work.

This progressive movement is seen, on the one hand, in publications of writers, and, on the other, in the legislative measures adopted by states. First then, with regard to the former. It has already been shown that various protests were made and books issued, before the appearance of the *Dei Delitti*, against the practice of torture and other cruel and irrational proceedings. In France, Voltaire had already made an attack on existing abuses before the Italian writer's book was published; but there is no doubt that the treatise had a very great influence on him, as we may readily see from the character and tone of his *Commentary* added to the French translation, and from his subsequent writings on criminal matters, which have already been mentioned. Nearly all his arguments in these are but expanded, elaborated statements, reinforced by examples and illustrations, of Beccaria's concisely expressed principles. There are two extant letters written by Voltaire to Beccaria; and of special interest here is the one addressed to him, May 30, 1768, regarding the latter's influence in raising up again the long-crushed sisters, reason and humanity, in stemming the tide of bigotry and fanaticism, and dealing a death-blow to cruelty—that malignant hand-maiden to religion. “. . . Vous avez aplani,” he observes, “la carrière de l'équité dans laquelle tant d'hommes marchent encore comme des barbares. Votre ouvrage a fait du bien et en fera. Vous travaillez pour la raison et pour l'humanité qui ont été toutes deux si longtemps écrasées. Vous relevez ces deux sœurs abattues depuis environ seize cent ans. Elles commencent enfin à marcher et à parler; mais dès qu'elles parlent, le fanatisme hurle. On craint d'être humain autant qu'on devrait craindre d'être cruel . . . Ils ont puni d'une mort épouvantable,¹ précédée de la torture, ce qui ne méritait que six mois de prison. Ils ont commis un crime juridique. Quelle abominable jurisprudence que celle de ne soutenir la religion que par des bourreaux. Voilà donc ce qu'on appelle une religion de douceur et de charité! Les honnêtes gens déposent leur douleur dans votre sein comme dans celui du vengeur de la nature humaine.”

In the parlement of Grenoble the eloquence of the advocate-general Servan, his assault on the prevailing legislative abuses and demand of reform were inspired by Beccaria's reasoned

¹ Referring to the death of La Barre.

condemnations, as was also the denunciation of Dupaty, advocate-general of the parlement of Bordeaux, directed against the torture of three persons accused of theft (1785). Similarly, the defence of De Portes and Calas by Loiseau de Mauléon, an advocate of Paris, sets forth rational and humane views, in conformity with the new conceptions. Conservative and obstinate adherents of the old régime, men like Muyart de Vouglans and Jousse, endeavoured to defend the traditional system—but in vain. The school of Rousseau de Lacombe had had its day; and the authority of the old oracles of criminal jurisprudence, such as Damhouder, Farinaccius, Covarruvias, Julius Clarus, Benedict Carpzov, was fast sinking.

In this progressive movement the part played by Voltaire was a particularly conspicuous one, as has already been pointed out. Besides his attacks on public corruption, abuses of taxation, commercial restrictions, the power of priests, cases of serfdom, and many other matters that called for reform, and notwithstanding his lack of sympathy with democratic ideas, popular representation, and political equality, he devoted himself with all the insatiable ardour of his soul to expose, to ridicule, to denounce the monstrous absurdities of the penal code. He demanded, like Beccaria, the abolition of torture, of all forms of mutilation, of every kind of agonising or prolonged death. Like Beccaria, he laid emphasis on the extreme folly of prescribing a multiplicity of capital offences; he urged their restriction, though not necessarily—and here unlike Beccaria—their total abrogation. Like Beccaria, he showed the marked unwisdom of inflicting the same penalty of death for crimes of widely varying degrees of atrocity, and to giving, for example, a direct interest to the robber to assassinate his victim also. Like Beccaria too, he protested against the penalties inflicted for ecclesiastical offences, the grossly unjust practice of confiscating the offender's property whereby the innocent children were beggared for the misdeeds of their father, the severe imprisonment to which accused persons were subjected before their trial, and the interference with their right to prepare their defence.

The influence of Voltaire extended beyond the boundaries of his own country to many foreign states. Among his friends, correspondents, or admirers there were several sovereigns—the Emperor Joseph II of Austria, who read many of his writings with delight, and directed the Abbé Casti (who had succeeded

Metastasio as imperial poet) to compose a "melodrama" on the basis of a chapter of *Candide*; Frederick the Great of Prussia, whose relations with Voltaire were of the most intimate description; the Empress Catherine II of Russia; Gustavus III of Sweden; Christian VII of Denmark, who called Voltaire the "prince of the century"; Frederick of Hesse; Stanislas of Poland; and others. By their influence and exertions a new spirit of enlightenment, toleration, and humanity began to pervade the legislation of almost the whole of Europe. In Italy there was a good deal of violent opposition to the spirit and doctrines of Voltaire, among the nobility, the clergy, and the magistrates. But there were also distinct Voltairean elements.¹ These were found in most of the sovereigns of foreign origin, as, for example, in the Bourbons of Rome and of Naples, in the Austrian princes of Lombardy and Tuscany. Again, some of the rulers were served by philosopher-ministers, like Tanucci,² prime minister at Naples, Du Tillot,³ minister at Parma, Firmian,⁴ minister plenipotentiary of Maria Theresa at Naples, then in Lombardy; and these were among Voltaire's early disciples in Italy. Further, in every important centre there were some ardent spirits who manifested a persistent opposition to the prevailing ideas and institutions. They constituted, in a sense, the future revolutionary leaven. Many of them, a prey to restless dissatisfaction, became adventurers, and wandered throughout Europe. Also, a certain Voltairean element was found among the thinkers, hesitating and seeking their way, among the curious but cautious, abstaining alike from blind admiration and systematic opposition. These classes included laymen as well as ecclesiastics, patricians as well as plebeians; thus, there were on the one hand men like Popes Benedict XIV and Clement XIV, Cardinals Alberoni, Querini, and Passionei, and on the other progressive minds like Galiani, Genovesi, Parini, Capacelli. Finally, the world of savants welcomed Voltaire, and corresponded with him, and learned academies opened their doors to him. Be it remembered that the ideas on criminal law and administration spread by Voltaire were no other than the ideas of Beccaria.

To this influence of Voltaire in particular may be added the foreign influence of the Encyclopædists in general.⁵ Their works,

¹ Cf. E. Bouvy, *Voltaire et l'Italie* (Paris, 1898), pp. 316, 317.

² 1698-1783.

³ 1711-1774.

⁴ 1716-1782.

⁵ Cf. J. Fabre, *Les pères de la révolution* (Paris, 1910), pp. 560 seq.

breathing a military spirit, soon spread abroad. Philosophical discussions became everywhere more common; they were held in esteem as much in the fashionable salons of a Mlle. de Lespinasse or a Mme. Geoffrin, as among the more progressive spirits in all parts of Europe. The Encyclopædists, warring on senseless tradition, unjustifiable privilege, and intolerable tyranny, and advocating liberty, tolerance, and brotherhood, were usually regarded by their contemporaries as hopelessly un-christian, in comparison with saintly men like Bossuet, who defended intolerance, slavery, and theocracy. But their influence was none the less gaining more and more ground. Voltaire said—and without exaggeration—that the spirit of French philosophy was extending from Archangel to Cadiz. Grimm's confidential correspondence with several continental sovereigns did much to diffuse French conceptions; at first it was concerned with art and literature, but gradually it came to embrace a much wider field, including political, social, philosophic, and religious matters. Thus the *Correspondance littéraire* (1754–1790) is closely associated with the Encyclopædist movement in general; and, indeed, for some twenty years constituted its secret official organ in Europe, and so contributed substantially to its propaganda. In Austria Joseph II aimed at establishing his government on philosophic principles, and promoting liberty and religious tolerance in his dominions. Frederick II of Prussia was a master of French, and cherished predilections for French culture; he was surrounded by Frenchmen, and dreamt of making Berlin another Paris. The influence of Rousseau in Germany was especially marked. Catherine of Russia was attached to the leaders of the movement, and frequently corresponded with them. On Voltaire, D'Alembert, Diderot she lavished praise; she invited them, as well as Beccaria and others who had new ideas and were philosophically inclined, to her court at St. Petersburg. In Poland, Voltaire was worshipped; and Rousseau was invited to draw up a plan for a constitution. Similarly Corsica called on the author of the *Contrat social* to be its legislator. The various states of Italy were influenced by the French philosophers. Condillac was appointed tutor to the Duke of Parma. Leading Italian thinkers, like Beccaria and Filangieri, were proud to proclaim themselves disciples of the transalpine school. The Abbé Galiani, the liberal economist, wondered how anyone could live elsewhere than on the banks of the Seine. In Tuscany, the Duke Peter

Leopold, having been eulogised for his attempted innovations, observed: "I apply only what others have conceived, I have taken all my ideas from French books." Other Italian princes were imbued with the same ideas. The new movement even reached Spain and Portugal, so long a prey to religious bigotry and obscurantism. In the former country the Count of Aranda actually ventured to attack the Jesuits and the Inquisition; in the latter country the Marquis of Pombal showed himself to be a minister favourable to reform. Between England and France there was a constant interchange of ideas. English philosophers, such as Locke, Newton, Shaftesbury, Bolingbroke, were popular in France; French writers, like Voltaire, Montesquieu, Rousseau, Diderot, enjoyed great popularity in England. Blackstone made acknowledgments to Beccaria, and Bentham and Romilly proclaimed their great indebtedness to him, and to the French philosophers. In distant America too, at the time of the secession, the law of nature was frequently appealed to, and the influence of Voltaire and Rousseau was evident.

In the meantime, writers in different countries, encouraged by this propagation of new conceptions, and, in many cases, directly aroused by the great example of Beccaria, issued works denouncing the abuses and barbarous practices of criminal law and penal administration. In France, in addition to the writers already mentioned, men like De la Madeleine and Pastoret vigorously advocated reforms, the former proposing a reorganisation of the laws, in accordance with the principles of Beccaria, the latter condemning the use of the capital penalty.¹ Similarly, Marat opposed the punishment of death, in a book (1789) containing this inscription: "Nolite, Quirites, hanc sævitiam diutius pati." After the death of Louis XVI, Condorcet also condemned capital punishment, but only in the case of non-political crimes. In Austria, immediately after the publication of Beccaria's treatise, Sonnenfels, a professor at Vienna, commended the author for showing that the infliction of death was an irrational penalty, and afterwards produced his small work on the abolition of torture, which soon had a large circulation and was translated from German into several other languages.² In

¹ *Des lois pénales* (1790). He drew up a list of some 120 offences that were punishable with death in France.

² J. von Sonnenfels, *Ueber die Abschaffung der Tortur*. (Trans. in French in vol. iv of Brissot de Warville, *Bibliothèque philosophique du législateur, du politique, du jurisconsulte*, 10 vols. (Paris and Berlin, 1782-1785).)

Italy, two years after the appearance of the *Dei Delitti*, P. Risi issued a work in Latin on criminal procedure and punishment, which he dedicated to Count Firmian, and in which he denounced torture and cruel penalties. Similarly, Natali, a Sicilian marquis, dealt with the applicability and efficacy of different punishments. In 1777 Pietro Verri, the former friend of Beccaria, composed a dissertation on torture¹ (published in 1804), in which he showed the evil nature of the practice, extorting, as it often did, "confessions" of alleged crimes at once ridiculous, absurd and impossible. In Naples, Filangieri issued his *Science of Legislation*,² which is full of erudition. While he differs from his predecessor in several matters, he lays emphasis, however, on some of the important principles enunciated by Beccaria, and condemns abuses, such as secret accusations and prison conditions, which had already been pointed out by the latter. Again, the *Elements of Criminal Law*,³ by P. Renazzi, one of the first systematic productions, follows the lines marked out by Beccaria. It advocates more moderate penalties, and insists that it is essential to graduate them conformably to the character of the offences. And so penal doctrines continued to make progress in Italy, not only in published writings, but also in the teaching of universities; so that we find adherents of reform, like L. Cremani, T. Nani, and M. Delfico, denouncing the laws established on the basis of the ancient Roman jurisprudence, which made for despotism and intolerance.⁴ Amalry in Holland, Mello Freire in Portugal, Campomanes, Lardizabal, Jovellanos in Spain, were also in favour of measures of amelioration. In England, the immediate influence of Beccaria is apparent in the work of Blackstone. That portion of his *Commentaries* dealing with the criminal law was first issued in the year following the publication of the *Dei Delitti*. The author refers to his Italian contemporary more than once. Like the latter he argues that the certainty of penalties is more effectual than their severity, and also deems it absurd to apply the same punishment to crimes varying in atrocity. He condemns the frequency of capital punishments, and points out as a "melancholy truth" the existence on the statute-book of 160 offences punishable capitally. Like Blackstone, Lord Mansfield also spoke of Beccaria with respect. In 1768 an anonymous

¹ *Osservazioni sulla tortura*, etc.

² *Scienza della legislazione* (1780).

³ *Elementa juris criminalis*, 3 vols. (Rome, 1773-1781).

⁴ Cf. Cantù, *op. cit.*, chap. xxi.

translation of the *Dei Delitti*, together with Voltaire's commentary, was issued in England. Three years later came the *Principles of Penal Law*, by William Eden, appointed under-secretary of state in 1772, afterwards Lord Auckland. The influence of the Italian writer is evident not merely through the direct reference to him, but through the various *dicta* set forth, and the spirit of general hostility manifested against the prevailing practice of the criminal law. "The great object of the law-giver," says Eden, "is the prevention of crimes. . . . Vengeance belongeth not to man."¹ "Lenity should be the guardian of moderate governments."² He says that severe penalties are "instruments of despotism," and too rigorous punishments lead to impunity. "The excess of the penalty flatters the imagination with the hope of impunity."³ . . . "The acerbity of justice deadens its execution."⁴ "Penal laws are to check the arm of wickedness, but not to wage war with the natural sentiments of the heart."⁵ "Obsolete and useless statutes should be repealed, for they debilitate the authority of such as still exist and are necessary."⁶ "Nothing but the evident result of absolute necessity can authorise the destruction of mankind by the hand of man. The infliction of death is not therefore to be considered in any instance as a mode of punishment, but merely as our last melancholy resource in the extermination of those from society, whose continuance among their fellow-citizens is become inconsistent with the public safety."⁷ All these remarks are scarcely more than repetitions of Beccaria's observations. Similarly, Lord Kames, the Scottish judge, protested against the vindictive nature of the English penal system, and the multiplicity of capital punishments, and suggested the adoption of milder and more reasonable penalties, which would attain their object "with less harshness and severity."⁸ Madan's *Thoughts on Executive Justice*⁹ (1784) adopts Beccaria's principle of the certainty of punishment as the most effective deterrent of crimes, but the author makes a sinister use of the doctrines in advocating an unrestrained execution of the sanguinary law as it then existed. Paley's brief treatment of criminal law¹⁰ shows distinct

¹ *Principles of Penal Law* (London, 1771), p. 6.

² *Ibid.*, p. 12.

³ *Ibid.*

⁴ *Ibid.*, p. 13.

⁵ *Ibid.*, p. 14.

⁶ *Ibid.*, p. 16.

⁷ *Ibid.*, pp. 21, 22.

⁸ *Historical Law Tracts. Criminal Law* (Edinburgh, 1776).

⁹ Cf. *infra*, Romilly, chap. ii.

¹⁰ *Principles of Moral and Political Philosophy* (1785). See *infra*, Romilly, chap. ii.

progressive tendencies and the influences of Beccaria, but in many respects betrays the writer's attachment to the prevailing traditions. Romilly, who often acknowledged his indebtedness to the *Dei Delitti*, wrote a reply to Madan and made a searching examination of Paley, and successfully refuted the arguments of both of them.¹ Similarly, Bentham, the arch-critic and prince of constructive expounders, the inexhaustible source of a great multitude of reforms in England, was a disciple of Beccaria, whom he thus apostrophises: "My master, first evangelist of reason, who hast raised thy Italy so much above England and also France . . . thou who speakest reason on laws, whilst in France they speak only jargon (which, however, is reason itself compared with the English jargon), thou who hast made such frequent and useful excursions in the paths of utility."² The relationship of Bentham, Romilly, and the English movement to Beccaria and the continental movement will be considered more fully in the succeeding chapters.

Besides the spontaneous efforts of these individual writers, the current of progress, so profoundly influenced by Beccaria, was further advanced in several places on the Continent by public societies and academies, which offered prizes for the best plans of penal reform. We have already seen, in the account of the Italian writer's life, that the Economic Society of Berne awarded its medal (1764) to the anonymous author of the *Dei Delitti*. In 1777 the same society offered a prize, to which Voltaire and Thomas Hollis contributed additional sums, for the best project of a penal code. In 1773 the academy of Mantua proposed to award a medal for a dissertation on a problem relating to the principles of criminal law. And in 1780 the academy of Châlons-sur-Marne offered a prize for an essay "on the best way of mitigating the harshness of French penal law without endangering public safety." Many competitors presented theses, in which they suggested publicity of procedure, abolition of torture, discontinuance of the oath that was administered to the accused, full liberty of defence, and other reforms.

Having now pointed out how the reform movement was pushed on by writers and other individual enthusiasts, it is

¹ See *infra*, Romilly, chap. ii.

² From MS. in University College, London; cited by E. Halévy, *La formation du radicalisme philosophique* (3 vols.), in vol. i, *La jeunesse de Bentham* (Paris, 1901), p. 30.

desirable to consider now briefly the efforts in the same direction made by states. From the above considerations, it is clear that a general fermentation was going on throughout Europe. "Tout semblait annoncer," says Brissot,¹ "une révolution prochaine dans la législation de l'Europe entière; les philosophes en marquaient les abus; les princes semblaient chercher le moyen de les détruire."

In Austria, the first noteworthy pioneer of reform was Sonnenfels, a Viennese professor, who was stimulated by Beccaria's treatise, and advocated considerable relaxations in the criminal code. Maria Theresa herself did not escape the influence of the growing movement; and in 1768 the "Constitutio criminalis thesiana" was promulgated which, among other changes, limited the application of torture. A few years later the Empress informed Sonnenfels that he was reported to be teaching principles antagonistic to the law established, especially with regard to torture and the capital penalty. Whereupon he presented to the Empress a memorandum condemning the barbarous practice of torture, and appealing to her to abolish capital punishment. And in 1776 we find that torture was formally abrogated in the empire.

Attempts were at the same time made in Italy to introduce more rational measures. But here, where torture and other severe practices were more frequent than in most other countries, there was a dogged conservative element, and new proposals met with obstinate opposition. In Mantua, a council of government, held in 1772, admitted the inhumanity of torture, but arrived at no decisive conclusion. The question was referred to the magistrates, most of whom were in favour of its maintenance. Similarly, when the practice had been abolished in Austria the senate of Lombardy met to consider the advisability of following the example, but they came to no decision. Protests and denunciations, however, continued to be made, and with greater frequency and insistence. And so in 1783 Kaunitz openly expressed his disapproval of certain methods of torture, and caused the use of fire and of the wheel to cease. The following year he gave secret instructions to the courts to discontinue the use of the gibbet, but suggested that there was no need to make a public announcement to that effect. The authorities were no doubt anxious that it should not be thought that the change was made

¹ J. P. Brissot de Warville, *Mémoires* (Paris, 1830-1832), vol. ii, p. 17.

out of deference to Beccaria and his disciples. Kaunitz pointed out that his majesty, Joseph II, in abolishing the death penalty, paid no heed to the views of modern philosophers who, affecting horror at the shedding of blood, claimed that repressive justice had not the right to take men's lives, which nature alone had given them. Rather, consulting his own convictions he thought that the various penalties substituted for capital punishment, such as imprisonment, corporal chastisement, fasting, perpetual exile, would, by reason of their duration, strike more terror into the hearts of would-be malefactors. Further, by a decree of 1789 the infliction of all forms of torture was to cease. This was communicated by Kaunitz, who again advised secrecy; but the decree was published in the *Tuscan Gazette*.

Before this total abrogation of torture, Joseph II, some five years after his accession, published his code of crimes and punishments (1785), the object of which was to give a definite direction to penal justice, to remove everything of an arbitrary character from criminal administration, to discriminate clearly between political and common offences, and to render punishments more effective. Capital punishment was limited to high treason, some of the worst horrors of imprisonment were removed, the severity of branding, fasting, and the bastinado was mitigated, blasphemers were to be treated as lunatics and confined in a mad-house, attacks on religion and offences against morality were to be punished, not by death, but by hard labour and the lash, and the punishment of the accused was not to involve confiscation of his property, save in cases of treason. The defects of this code as applied to Lombardy, notwithstanding the attempted amelioration, soon became apparent. Accordingly, representations were made to Vienna; and in 1790 a commission was appointed, of which Beccaria was the most noteworthy member. We have already seen the nature of the minority report as to capital punishment, which was, no doubt, prepared by him; besides his reasoned deprecation of the ubiquitous death penalty, he also condemned the frequent use of the bastinado and the pillory.

In Tuscany, under the Grand Duke Leopold, we find the most far-reaching and the most successful adoption of Beccaria's principles in one of the most notable legislative works of the time. When Leopold ascended the ducal throne, the Tuscans were among the most abandoned people of Italy; and in spite of the extreme rigour of the penal law, with all its paraphernalia of

rack, wheel, and gallows, atrocious offences, including murder and violent robbery, were common. In 1786 Leopold resolved to try a more rational scheme, by mitigating the excessive harshness of the law, removing many useless and inconsequent anomalies, and presenting a reconstruction of clarified elements. He therefore prepared a code in which punishments were proportioned to crimes, the number of treasonable acts was reduced, the great severity of imprisonment was relaxed, the much abused right of asylum was revoked, confiscations—so disastrous to the innocent—were diminished, torture and mutilation of witnesses or accused were abolished, and—what is still more remarkable—the capital penalty was discontinued even in the case of murder. In November 1789 this code was published, with the following preamble: "We have recognised with very great satisfaction that the moderation of penalties, combined with greater vigilance to prevent culpable acts, rapid hearing of cases, promptitude and certainty of repression, far from increasing offences, has diminished secondary ones, with the result that the most atrocious crimes are scarcely ever heard of. We have therefore resolved not to postpone any longer the reform of the criminal law, and the abolition of torture and capital punishment as useless things, which do not fulfil the object society aims at." It is true that Leopold, having succeeded his brother as emperor, issued an edict, June 1790, re-imposing the penalty of death for cases of violent sedition, and another in August 1795 re-establishing it for attempts to subvert the Catholic religion, and for premeditated homicide; but till March 1799 (when the Grand Duke left Tuscany) the sentence of death was pronounced only in two cases, of which one was commuted to perpetual imprisonment. On the whole, the result eminently justified the general mitigation. A contemporary observes that Tuscany, which had been conspicuous for the many crimes and villainies perpetrated there, became "the safest and best ordered state of Europe."¹ And it is further related that during a period of twenty years only five murders were committed in Tuscany, whilst in Rome, where the death penalty continued to be inflicted, no fewer than sixty were committed within the short space of three months.²

In France, legislative and administrative abuses had for

¹ Major-General C. Lee, "Sketch of a plan for the formation of a military colony," in *Memoirs* (London, 1792), p. 81.

² Cf. B. Rush, *An enquiry into the effects of public punishments upon criminals and upon society* (Philadelphia, 1787), p. 15.

several generations been crying for reform. The existence of long-standing grievances and sufferings, together with the protests, denunciations, appeals to nature and humanity, and demands for reform made by bold and progressive spirits, prepared the way for the enthusiastic reception of Beccaria's treatise. For even down to the middle of the eighteenth century the inquisitorial and secret criminal procedure and the ferocious penal system were an outrageous scandal. And so the book was, naturally, widely read and discussed. Several writers, as has already been shown, helped to propagate the principles expounded in it. Lacretelle attributed the accelerated reform movement to the influence exercised by the *Dei Delitti*. Before the revolutionary period public opinion in France, as in most European states, was inevitably gaining ground and acquiring greater and greater force. The old French tribunals were perceptibly modifying their harsh methods. In two royal ordinances (August 24, 1780, and May 1, 1788) the abolition of the two kinds of torture, "la question préparatoire" and "la question préalable," was announced. The latter proclamation also forbade the judge to pass sentence without stating the offence, and promised reparation to those accused and acquitted. Further, Louis XVI notified his intention to remodel the entire fabric of French criminal jurisprudence; and accordingly he invited the French people at large to submit suggestions and memoranda to the keeper of the seals. Some important measures followed, but met with strong opposition from the parlements of Paris, Metz, Besançon, the Cour des Aides, and other bodies; and so on September 23, 1788, the royal declarations were withdrawn and the project fell through. The reform of the French criminal law was thus reserved for the revolutionary legislators. The principles enunciated by Beccaria imparted to them inspiration and guidance, and the beneficial work accomplished elsewhere, and in certain respects the example of England in particular, supplied an additional incentive. The Constituent Assembly, by a series of decrees of which the most important is that of September 16-29, 1791, entirely reorganised criminal procedure. The "jury d'accusation" and the "jury de jugement" (corresponding to our grand jury and petty jury) were instituted, proceedings before the latter were to be public and oral, and the powers of the public prosecutor were greatly curtailed. Torture was once more abolished, and accused were to be allowed the help

of counsel. In October 1795 the Convention passed the code of crimes and penalties, prepared by Merlin and Cambacères, introducing further improvements in procedure, and allowing the accused to obtain the notes of the preliminary examination for purposes of his defence. The Code of Criminal Investigation of 1808 was a compromise, incorporating the rules as to pleading and judgment from the revolutionary legislation, and those concerning preliminary examination from the old ordinance of 1670.

Following Beccaria's view—which in its strict form is as fallacious as it must be disastrous—the right of pardon by the executive was abolished (September 25–October 6, 1781). Some ten years earlier Brissot de Warville observed: "When legislation is good, free pardon is but a sin against the law." And of course the Assembly took it for granted that their measures were good. The prerogative of pardon had certainly been abused; but instead of amending it they destroyed it altogether. It was soon found necessary to restore it, though in a restricted form (August 4, 1801).

In the revolutionary doctrines as to punishment, the influence of Beccaria is likewise palpable. In the Declaration of the Rights of Man (1789) we read that the law has the right to repress only acts injurious to society, but must not ordain any penalties that are not evidently and strictly necessary. And the Constituent Assembly proclaimed (August 16–24, 1790) that punishments should be mitigated and proportioned to offences. In 1791, besides the suppression of all tortures, branding, mutilations, and needless humiliating inflictions, it was decreed that "the penalty of death is henceforth to consist simply in deprivation of life." In October 1795 the Convention resolved: "The penalty of death will be abolished throughout the French Republic from the day of the proclamation of peace." With regard to the practice of confiscation, which was so strongly condemned by Beccaria, a decree of January 1790 abrogated it, but it was soon restored, and not finally abolished till the Restoration.

Turning to Spain, we notice that even this comparatively benighted country could not escape the progressive movement. In 1775 the "*Novísima recopilación*" prohibited the torture of an accused without the sentence having been previously pronounced, and exempted *hidalgos* therefrom.

In Portugal the reforms of the Marquis of Pombal are noteworthy.

In Denmark torture was abolished in 1771.

In Russia, Catherine I abolished the gallows and the wheel. Elizabeth made a vow not to consign anyone to death, and she kept her word for twenty years of her reign. Catherine II, posing as the friend and protectress of the philosophers and flattered by their applause, resolved to reform the criminal law, and to establish a uniform penal code. Accordingly in 1767 she summoned to Moscow some 650 deputies from all parts of Russia to assist in the great task. In the instructions read to the assembly, as a basis for the proposed codification, the principles enunciated obviously recall Beccaria's doctrines, not only in their spirit, but even in their very letter. Some of these maxims of juridical and political philosophy, as well as of common sense, are as follows: Laws should be considered only as a means of conducting mankind to the greatest happiness. It is incomparably better to prevent crimes than to punish them. All punishment that is unnecessary to the maintenance of public safety is unjust. The aim of punishment is not to torment sensitive beings. Cruel punishments are useless, and often are iniquitous. Penalties should be equal and uniform throughout the state, and should be publicly and promptly applied. In methods of trial the use of torture¹ is contrary to sound reason; humanity cries out against the practice and insists on its abolition. In the ordinary state of society, the death of a citizen is neither useful nor necessary; it is justifiable only in the rarest cases, such as insurrection. Judgment must be nothing but the precise text of the law, and the office of the judge is to pronounce only whether the action is contrary or conformable to it. No one is to be arrested without legal proof. It is better to let ten guilty men go free than to condemn one innocent man. Would you prevent crimes, contrive that the laws favour less different orders of citizens than each citizen in particular. Let men fear the laws and nothing but the laws. Would you prevent crimes, provide that reason and knowledge be more and more diffused. To conclude—the surest but most difficult method of making men better is by perfecting education.²

These instructions,³ from which we ourselves are not yet

¹ Torture was formally abolished in Russia by Alexander I in 1801.

² Cf. W. Tooke, *Life of Catherine II* (London, 1800), vol. i, pp. 441–448.

³ The MS. of these instructions, in twenty-three pages written by the empress herself, is preserved at the Imperial Academy of St. Petersburg, where there are also old copies of Beccaria's treatise in Latin, Russian, French, German, and Italian.

too advanced to learn something, were published and soon translated into several languages; they exercised an effect for good in other countries too. There is, however, a great distance between these counsels of perfection and their actual application, as one may easily see from the enormous number of legislative acts of the philosopher-empress.

The new ideas were readily accepted also on the other side of the Atlantic. After the American Declaration of Independence the reform of the penal law engaged the attention of the new governing authorities. Thus in Pennsylvania there had been some twenty capital offences; but in 1794 it was enacted that no crime, save murder in the first degree, was to be punished by death. This, indeed, was but a return to the principles of Penn's penal code, which had been annulled by Queen Anne. Thus, on the establishment of the new constitution the memory of the eminent Quaker is recalled in the application of the doctrines advocated by Beccaria.¹

As to our own country, we shall reserve for the subsequent chapters the consideration of the penal reform movement in general, and in particular the efforts made by persistent writers like Bentham, and in Parliament by brave self-denying spirits like Romilly, to remove the outworn anomalies and irrational excrescences of our criminal jurisprudence, and to mitigate throughout the needless severity of the penal system; we shall see too what a dogged, unreasoning, prejudiced hostility to innovation was maintained alike by peers, bishops, judges, and the overwhelming majority of the commons.

Having now considered the life and character of Beccaria, the nature of the age in which he lived, the formative influences on him, the style and essential substance of his treatise, its relationship to the general European movement, and its effect on writers, sovereigns, and legislative activity, we may conclude this chapter by summing up briefly the main characteristics of the work, and indicating the position it occupies.

To appreciate justly the importance of the work of reformers like Beccaria, Bentham, Romilly, it is indispensable to bear in mind how immensely different political and juridical institutions are in our own day from those prevailing in their time. We are now reaping the fruit of their toil. We are not now beset by the abuses and horrors that aroused their souls to indignant protest

¹ Cf. R. J. Turnbull, *A visit to the Philadelphia prison* . . . (Philadelphia, 1796).

and deliberate revolt. We can scarcely conceive that it should ever have been necessary to argue, to criticise, and suggest amendments as they did. Therefore, in considering the work of earlier innovators, whose ideas have been for the most part universally incorporated into actual practice, there is at first a tendency to regard it as antiquated, and so to underestimate its intrinsic worth in relation to subsequent development. The name of Beccaria is associated with ideals in criminal jurisprudence and penal organisation, most of which have been successfully achieved, and consequently forgotten; whereas the name of such an innovator as Darwin is linked to a scientific ideal that remains controversial, and hence ever before our minds. And so, paradoxical as it may seem, the fame of a pioneer often becomes dimmer the more his efforts have been crowned with success. But the historical eye, tracing out the evolution of things, sees them in their proper perspective.

The triumph of Beccaria's teaching has been complete. His principles are now embodied in every criminal code in Christendom; and they have penetrated into the distant Orient. Indeed, no civilised code of criminal law, wherever promulgated, can now disregard them. Beccaria was the first systematic modern criminal law reformer in point of time; and if we take as a criterion the far-reaching results brought about by his work, we must also account him the greatest. This is all the more remarkable in that he was but a young man when he produced his small treatise, and was of timid and retiring disposition, unversed in law, a stranger to polemical propagandism, and a dweller in the land of the Inquisition. His work was placed by Brissot de Warville at the head of his voluminous publication, *Bibliothèque philosophique du législateur, du politique, du jurisconsulte*,¹ and he justly speaks of it as "une œuvre hardie et lumineuse, qu'on ne croirait pas sortie d'un pays où règne l'Inquisition." In certain respects it might be regarded as standing, in reference to the sphere of criminal jurisprudence, as, say, Bacon's *Novum Organum* does in science, or Descartes' *Principia* in philosophy. It represents a definitive rejection of reiterated dogma and mere precedent, and marks a return to first principles.

The views therein expounded are not, of course, original in an absolute sense. We meet with them, here and there, in the writings of ancient philosophers, in those of later theologians

¹ 10 vols. (Paris and Berlin, 1782-1785).

and publicists, and occasionally also in papal bulls and conciliar resolutions. We meet with protests against torture, for example, and earlier condemnation of the barbarous ferocity of penal methods; and sometimes even the legitimacy of capital punishment is questioned. But before Bèccaria scarcely anyone had found, or even sought, a juridical theory of the right to punish. At most the interest of the state—which meant the fluctuating interest of the sovereign or governors, and the arbitrary discretion of irregularly constituted authorities—and the principle of penal exemplarity—which meant the vindictive treatment of malefactors—were the guiding-stars, which led to an overwhelming multiplication of capital offences, indiscriminate infliction of torture, branding, and other atrocious punishments, secret accusations, inquisitorial procedure, and the rest of the practices due to a fierce “lex talionis.” Beccaria’s originality lies in his insistence on the necessary rights and obligations inherent in the relationships between society and the individual, as determined by the doctrine of public utility, on the essential aim of government, and the object of repressive and remedial justice as dependent on absolute necessity; his originality lies further in the systematisation of fundamental principles, in the consistent basing thereon of legal institutions and penal measures, and in his sober, incisive, logical, cogent criticism of the main features of an entire system. The *Dei Delitti* presented the essential elements of a programme of reform, and constituted a definite point of departure for legislative renovation. No doubt its main object was to destroy rather than to construct. But truth and justice triumph more easily after the removal of obstacles, after the destruction of an incubus of errors and follies. Thenceforth whoever aimed at mitigating the rigour of penal law, rationalising the procedure, and proportioning punishments to offences appealed to the Italian author, adopted his principles, made use of his arguments. Beccaria may not, indeed, be a learned or profound criminalist, in the sense of one who would set forth a formidable array of authorities and texts, or present a great conglomeration of details gathered from the multitudinous bypaths of the ground he traversed. He preferred to remain on the broad highway, which is common to all men; and by forcibly emphasising the salient features in his survey, he became a great defender and benefactor of mankind. He has, in truth, been reproached for his ignorance of history and the

science of law.¹ But a man may be an effective reformer without possessing vast erudition; a man may bring about a revolution in morals or religion, with no greater equipment than an ardent unsubduable soul, and a few precepts. He was reproached by Kant for leaning too much to humanitarianism. Beccaria was undoubtedly a humanitarian, a lover of his fellow-creatures, who deplored their ghastly ill-treatment, and believed that justice might well be a little tempered with mercy. But he was not a sentimentalist, like Rousseau, for example, who thought that all men would be good and happy if all laws were repealed. He was not animated merely by an "âme sensible," or a "sensibilité larmoyante." He stood for rational, fair, useful laws that were to be consistently and impartially enforced.

No doubt some defects in his work are perceptible. He was a creature of the age in which he lived. He did not succeed in escaping from the shortcomings of an epoch that mingled, in nearly everything, error with truth. A friend and disciple of the Encyclopædists, he was unable to withdraw himself entirely from the ascendancy of their philosophic principles, from the vagaries of the social compact theory. But in spite of his acknowledgments to the French philosophers, his sound common sense and grasp of reality usually led him to generalisations more or less opposed to the implications of some of their dangerous premises, which were really as dogmatic as many of the assertions of their opponents. When he reasons analytically he tends at times to go astray. He bases the right to punish on the principle of common utility; but sometimes he does not appear to discriminate clearly between the principle of utility and the contractual principle. He does not sufficiently recognise the conception of justice necessarily inherent in human beings. But in the application of his doctrine, he arrives at the right conclusion that the limits of criminal justice depend on the exigencies of social preservation, that is, that no greater penalty should be imposed than is necessary to deter from crimes. Kant's criticism of Beccaria's objections to the death penalty insists that the true aim of the legislator should be, not so much to seek the prevention of crimes and the reformation of offenders, as to exact due reparation from the malefactor in order to counterbalance and atone for his

¹ Cf. J. L. E. Lerminier, *Introduction générale à l'histoire du droit* (Paris, 1835), chap. xv: "Estimons Beccaria; il aimait l'humanité; mais il ignorait entièrement la science et l'histoire."

misdeed. But such a principle stringently applied would lead to nothing less than the "lex talionis," and would make any system automatic, lifeless, indifferent to social amelioration. However, when Beccaria attempts to refute the claim to inflict capital punishment, he relies on the two principles of social contract and utility; which, not being reduced to a common element, deprive that part of his penal philosophy, *qua* philosophy, of perfect coherence. (We shall see later that Bentham, an acuter logician, carefully differentiated these principles.) Again, Beccaria points out that four elements are to be considered in every penalty, namely, intensity, proximity, certainty, duration. Now, as he would admit, the profit resulting from the offence, as contemplated by a would-be delinquent, necessarily prevails over the evil of the threatened penalty, in respect of proximity and certainty. But being too much preoccupied in mitigating the rigour of punishment, that is, its intensity, he fails to recognise (which was clearly seen by the more analytic mind of Bentham) that what is wanting in proximity and certainty must be compensated by increasing the intensity. Certainty of punishment, he holds, is more effective to prevent crimes than rigour; and by increasing the former we may decrease the latter; but also we must increase proximity, promptitude of punishment, in order to lessen the evil of intensity, and that of uncertainty. Thus in one case he considers uncertainty as an evil, in another as a good. Certainty and proximity are evils on the same ground as intensity. Why should the latter element be invested with a greater reality? Further, the expressions "just" and "useful," reiterated by Beccaria and emphasised as determining factors, are not logically cogent; "just" for him seems to be frequently synonymous with "mild," producing a less totality of punishment, whilst "useful" signifies "efficacious," that is, producing a greater totality. Hence the application of the element of proximity or promptitude would produce the inconsistent result of attenuating and aggravating the punishment at the same time. As to the element of duration, he considers it in his examination of the capital penalty. The latter he describes as the "supreme punishment," and condemns it, apart from considerations of the social contract theory, on the ground that momentary rigour terrifies less than duration of punishment. Now if the penalty of death inspires less terror than perpetual imprisonment, it is because it is less grave. Thus Beccaria's

reasoning is affected by his humane sentiment; and in the belief that he is lessening certain penalties, he is actually making them more severe.¹ Voltaire recognised this fallacy in his *Prix de la justice et de l'humanité*. And Romilly, with the same data before him, is more logical in admitting the lesser punishment when the greater is allowed. "One reason," he writes, "why I cannot think that death ought so carefully to be avoided among human punishments is, that I do not think death the greatest of evils. Beccaria and his disciples confess that it is not, and recommend other punishments as being more severe and effectual, forgetting, undoubtedly, that if human tribunals have a right to inflict a severer punishment than death, they must have a right to inflict death itself."² The Italian author's reasoning is also defective when, despite his condemnation of the gross irregularities of criminal procedure and the unjust conviction based on unreliable or inadequate evidence, he proposes the penalty of banishment for those who are accused of heinous offences and whose guilt is probable but not clearly established. In spite of his solicitude as to the fair treatment of prisoners, he does not suggest that they ought to receive the "benefit of the doubt." A much more serious error on his part—disastrously followed, as we have seen, by the revolutionary legislators in France—is his opposition to the right of pardon by the executive, when once sentence has been pronounced by the courts. This view was the outcome of his principles that public safety must never be sacrificed to that of an individual, and that the law must always be inexorable; but in his fidelity to satisfy here the demands of the abstract syllogism, he forgot to take into account other considerations of supreme importance. He forgot even his own previous salutary pronouncement that political philosophy cannot gain any enduring good for society, unless it is based on the indelible sentiments of the human heart. No one showed the absurdity and cruelty of torture more forcibly than he; but he was wrong in saying that this infamous seeking after truth is a monument of the earlier savage legislation in which trials by fire, boiling water, etc., were proclaimed judgments of God. He must have known that torture was used in Greece and Rome, and that it was re-established in the Middle Ages with the revival of Roman jurisprudence.

Whatever errors and deficiencies are noticeable in Beccaria's

¹ Cf. Halévy, *op. cit.*, vol. i, pp. 124-127.

² Letter to Roget, May 9, 1783; in his *Memoirs*, vol. i, pp. 277-279.

reasoning, they militate but little against the large body of truths propounded in the treatise, which, taking into account its modest proportions, is certainly the most brilliant single contribution to criminal law reform that has ever appeared. The precious volume proved to be a veritable source of enlightenment to bedimmed minds, and a fruitful intellectual pasture whence arguments and suggestions could readily be gleaned by those opponents of the old régime who had before been inarticulate and resourceless. His principles and conclusions were even adopted and elaborated by great minds and potent personages, like Voltaire, Bentham, Romilly, and were utilised by all contemporary and subsequent reformers. For Beccaria's voice proceeded in the main from an original, independent source; it was not a mere echo of others. His views, couched in a signally incisive and captivating style, could not but sink deep into the minds of discriminating readers. He pointed out that the entire edifice of criminal jurisprudence should be based on the principle of public utility and the greatest happiness of the greatest number, and that penal justice should be moderated by the element of humanity. He questioned the legitimacy of capital punishment, and if he failed to convince everybody as to its total abolition, he certainly contributed much to bring about its rapid diminution in the case of a great many offences. He condemned torture in irrefutable arguments that convinced sovereigns in whose territories the practice existed; he reprobated branding, mutilation, and all needlessly atrocious punishments. He urged that the infliction of ferocious punishments by the state inevitably renders its subjects cruel, that the sight of blood so often shed under cover of the law habituates them to the sight of blood shed in furtherance of criminal designs. He denounced the numerous severe punishments inflicted for so-called religious offences, and the ecclesiastical authority in questions of secular jurisdiction. He insisted on the careful proportioning of penalties to crimes. He showed the inhumanity and the unjustifiable character of confiscations. He demanded that the law should be made known and invariable, and not made to depend on the caprice and arbitrary will of the magistrates; and that all subjects should be on an equal footing before the law, so that one class of persons might not be favoured at the expense of another. He showed that social degradation was consequent on the institution of ubiquitous espionage. He attacked the practice of secret accusations, the

use of "lettres de cachet," and the whole existing pernicious procedure; he exposed its abuses, its inquisitorial character, its denial of rights to the accused, its suppression of evidence, its concoction of mere suspicions, its exaction of oaths from the accused, its laying of traps in the course of the unwary victim's examination, its factitious calculation of the validity and relevance of evidence, its sudden construction of innocent acts as crimes, its lingering uncertainty. He called for a reform of the horrible prison system, the promiscuous throwing together of old and young, men and women, innocent, suspects, and guilty, first offenders and habitual criminals; he denounced the rigours of detention before trial; and urged an alteration of the foul conditions of gaols. He appealed to the universal conscience of mankind, and pointed out that it was necessary to effect a union between the principles of jurisprudence and the fundamentals of morality. He desired the whole structure of criminal law and penal administration to be based on reason,—not indeed on a fantastic "ratio" distilled from airy subtleties and metaphysical obscurities, but on reason that is intimately allied to common sense; he desired it to be based not on the vindictiveness of a savage, but on the justice and humanity of a true man. He showed that in the conduct of human affairs, the guidance of the head, which is so prone to play the tyrant, should be supplemented by the ineradicable feelings of the heart.

PART II

JEREMY BENTHAM (1748-1832)

CHAPTER I

BENTHAM'S LIFE AND LITERARY ACTIVITY

IN the preceding essay we have seen the nature of the relationship of Beccaria's life and work to the continental movement, and the indebtedness of Bentham to his predecessor. We have seen what a great effect was produced by a slender volume issued anonymously by a young man, shrinking from contact with the world, and to what extent the success it achieved was due to the circumstances of the time and to the intrinsic worth of the treatise. Now the continental reform movement, accelerated by the efforts of men like Montesquieu, Beccaria, Voltaire, Rousseau, and the Encyclopædists, is represented in England by a reform movement that was urged on by the herculean efforts of Bentham, whose marvellous series of writings, destined to accomplish so much in England, occupies—though it is the creation of one man—no mean place by the side of the whole collected body of kindred works produced by a host of continental writers. Of such a man as Bentham, of such works as his, we cannot know too much.

Jeremy Bentham was born in Red Lion Street, Houndsditch, on February 15, 1748 (new style). His great-grandfather seems to have been, in the time of Charles II, a prosperous pawnbroker in the City of London; and there both his grandfather and his father, Jeremiah, practised as attorneys. It appears that his father was at first a Jacobite, and then became an adherent of the Hanoverian dynasty.¹ His mother, Alicia Grove—the gentlest and most affectionate of women and the most devoted of mothers—was the daughter of a small tradesman at Andover. The marriage of Jeremy's father was always looked upon by his grandparents as a *mésalliance* and as an unfortunate mistake.

Young Bentham showed an extraordinary precocity. Even in his tenderest years his fondness for books was remarkable. On one occasion he was found reading a folio edition of Tindal's translation of Rapin's *Histoire d'Angleterre*. In his fourth year

¹ Bentham's *Works* (Ed. Bowring), vol. x, p. 2

he began Latin; and at the age of five was already known as "the philosopher." A year or two later he began French; and soon Fénelon's *Télémaque* absorbed his attention, and offered him an inexhaustible source of pleasure and instruction. This book, indeed, appears to have had an important formative influence on his life. In later years he wrote: "That romance may be regarded as the foundation-stone of my whole character; the starting-point from whence my career of life commenced."¹ He thought the work had implanted in his mind the seeds of later moralising; and if he is to be taken literally, he said² he discovered in it (as, for example, in regard to the discussion in Crete on the best forms of government) the earliest gleams of the principle of utility—that potent principle whose uncompromising application by himself and his disciples, in their criticism and reform of institutions, was to contribute so much to the destruction of the work of generations and to the foundation of a new order of things. The worthy attorney recognised the early intellectual power of his young son, and, with an eye on the woollen sack, injudiciously tried to keep away from him merely amusing books and to stimulate the unformed mind with serious works; but his reading was none the less desultory, including history, biography, and romances, among which were Voltaire's *Histoire de Charles XII* and *Candide*. He also showed early a taste for music; and at the age of six he could scrape a minuet on the violin. He frequently visited relatives in the country, where he acquired a love for gardens and flowers. This attachment to music and flowers he retained throughout his life, and it proved a source of joy and relaxation to him in his extraordinary consecration to literary work. During his early life stories of horrible phantoms were inflicted on him by the servants of the household—as was also the case with Romilly. And neither of them had throughout their lives entirely got rid of the baneful effects. Though their reason was emancipated from belief in ghosts, their imagination, by involuntarily conjuring up diabolical visions, sometimes caused them much torment. Long after in his old age, Bentham, speaking of these fears implanted into his early nature, marked as it was by nervous susceptibility, would say: "Though my judgment is wholly free, my imagination is not wholly so."³

In 1755 he was sent to Westminster School. He was small

¹ *Works*, vol. x, p. 10.

² *Ibid.*

³ *Ibid.*, pp. 13, 19, 21.

for his age, of delicate health, and of acutely sensitive and nervous disposition. Therefore he was not inclined to take part in the boys' games. But he made rapid progress in his studies, especially in Greek and Latin; he could write letters in Latin before he was eleven. In after years he observed that Westminster represented "hell" for him—whilst Browning Hill (where his grandmother lived) was his "paradise"—that the instruction there was "wretched," that the fagging system was a "horrid despotism,"¹ that his industry, however, enabled him to escape the birch—a notable achievement in those days. Ties of intimacy and companionship he failed to form. In his schoolboy days the world was, apparently, as much a solitude to him as he deliberately chose to make it at times in later life, when he liked to be described as the hermit of Queen's Square Place. His aversion from his fellow-pupils gradually led him to conceive a feeling of contempt for them. One cannot help hazarding the conjecture that had he had a wiser father (rather than one who, as the son himself says, was ever "bragging" of his accomplishments, and was always talking to him and to others of his powers), and a more sensible bringing up, certain extreme inconsistencies in his character, so conspicuously manifested later, might possibly have been prevented: the possession of a really affectionate disposition coupled with a pronounced indifference to the affection of others; the desire of intercourse with such congenial souls as Trail, Wilson, Dumont, Romilly, James Mill and others, added to such a strange indifference as led him to drop them one after another, with but little compunction, and sometimes even with a sneer; the marked egotism and arrogance shown in his serious scientific expositions together with a torrent of imputations on and abuses of others.²

On January 6, 1759, his mother died.

The following year, at the age of twelve, he matriculated at Queen's College, Oxford. He subscribed to the Thirty-nine Articles with great reluctance; and this act left a painful and enduring impression on him. Notwithstanding certain failings such as those just indicated, he possessed the great fundamental qualities of truth and sincerity. Matters of conscience he took very seriously, and not with the levity of the conveniently accommodating minds of men ready to trim and adapt themselves to the dictates of self-interest. All his life he remembered with

¹ *Ibid.*, p. 34.

² Cf. *Edinburgh Review*, vol. 78 (Oct. 1843), pp. 467, 468.

what horror he witnessed, at Oxford, the expulsion of five Methodist students for heresy, and with what horror he found himself compelled to adhere outwardly to what he did not inwardly accept; the agony he experienced that day he compared—in his curiously hyperbolical manner—to that of Jesus crucified.¹ Later he bitterly remarked that the certain results of an English university education were mendacity and insincerity.² In 1763 he took his B.A. It is related that though he had by now grown considerably, he was yet so weak that it was painful to him to drag himself upstairs; and owing to the extreme feebleness of his knees, attempts to teach him dancing had to be abandoned. In November 1763 he began to eat his dinners at Lincoln's Inn; and he paid visits to the Court of King's Bench, where his father had obtained for him one of the students' seats. Thus, he was present in February 1764 at Wilkes' trial and condemnation, and four years later he also heard it reversed in the same court by Lord Mansfield, whose graceful and fascinating eloquence had for the time being captivated him. He afterwards said that he, like others, had been perfectly bewitched by that eminent judge's "grimgibber," that is, taken in by his pompous verbiage.³ In December 1763 he had attended the lectures of Blackstone at Oxford. "I, too, heard the lectures, age sixteen," he observed in 1822, "and even then no small part of them with rebel ears." He claimed that even at that age he at once detected the fallacy as regards natural rights, and deemed the reasoning as to the descent of the *hæreditas* to be illogical and futile. He described the Vinerian professor as formal, precise, wary, and affected; though he admitted that the lectures were rather popular, attracting numbers of auditors varying from thirty to fifty. A few years after he had heard Blackstone, he wrote in his commonplace book that the author of the *Commentaries* had imported the disingenuous character of the hireling advocate into the chair of the professor: "He is the dupe of every prejudice and the abettor of every abuse. No sound principles can be expected from that writer whose first object is to defend a system." ■

In 1765 his father married a second time, much to Jeremy's vexation, and settled on the son some property, which brought in about ninety pounds a year. The lady was Mrs. Abbot, widow

¹ Cf. *Not Paul but Jesus*, Introduction; *Works*, vol. x, p. 37.

² *Church of Englandism*, xxi.

³ *Works*, vol. x, p. 45.

[■] *Ibid.*, p. 141.

of a fellow of Balliol, and the mother of two sons, of whom the younger, Charles Abbot,¹ eventually became the author of some important administrative reforms, the Speaker of the House of Commons and the first Lord Colchester.

In 1766 Bentham took his M.A. degree; his comment was that he now strutted in his new gown "like a crow in a gutter." The following year he left Oxford for London, to begin, as was his father's cherished hope, his progress towards the woolsack. He was called to the bar at Lincoln's Inn (of which he became a bencher exactly half a century later). The methods and requirements of the legal profession could scarcely suit one of his proclivities and point of view; it is not surprising, therefore, that his ambitious father's expectations were very soon grievously frustrated. The paternally destined Lord Chancellor did not even seek success at the bar. Indeed, when he got his first brief in a suit involving a claim of some fifty pounds, he advised that the case should be dropped and the costs saved. In his commonplace book (1773-1776) we find such entries as the following: "It is impossible for a lawyer to wish men out of litigation, as for a physician to wish them in health." "Barristers are so called (a man of spleen might say) *à Barrando* from barring against reformation the entrances of the law." "Oh, Britain! oh, my country! the object of my waking and my sleeping thoughts! whose love is my first labour and my greatest joy—passing the love of woman—thou shalt bear me witness against these misleading men. I cannot buy, nor will I ever sell my countrymen. My pretensions to their favour are founded not on promises, but on past endeavours—not on having defended the popular side of a question for fat fees, but on the sacrifice of years of the prime of life—from the first dawnings of reflection to the present hour—to the neglect of the graces which adorn a private station; deaf to the calls of present interest, and to all the temptations of a lucrative profession."² As early as 1759 he read the *Memoirs of Teresa Constantia Philips*, in which there is a narrative of vexatious legal proceedings regarding the heroine's marriage; and the book must have made a deep impression on the youthful mind. He afterwards said in reference to such abuses: "The Demon of Chicane appeared to me in all his hideousness. I vowed war against him. My vow has been accomplished."³

His father's discomfiture was completed when the son practi-

¹ 1757-1829.

² *Works*, vol. x, pp. 35, 37.

³ *Ibid.*, p. 72.

cally abandoned his profession, saying, in regard to the books necessary for legal study, that he could not bear to read "the old trash of the seventeenth century"; instead, he began to dabble in chemistry and to study physical science. The disappointment and lamentations of Jeremiah may well be imagined; the hope of the family was looked upon as a "lost child." There was, in truth, no real compatibility between him and his erring son. "The elder Bentham," says a writer in the *Edinburgh Review*, "was authoritative, restless, aspiring, and shabby; lucky in his purchases, but remarkably unlucky, even among fathers, in misunderstanding and mismanaging his sons—a talent he had the cruelty to live to exercise for upwards of forty years. It was most unfortunate for all parties, that two sons, such as Jeremy and his brother Samuel, should have been born in such a house. With geniuses of the highest order—the one in legislation, the other in mechanics—they do not appear to have had a pennyworth of common sense, for common life, between them. They might have made the happiness of the home of a Plato and an Archimedes; but what could they do with an ambitious attorney, or he with them? The instinct of genius took them away betimes from gainful arts to ingenious speculations."¹ This description is, of course, overcharged, but it certainly contains much truth. Jeremy himself referred to his father's "hectoring" and "self-obstination"; and his dislike of his stepmother helped considerably to widen the distance between them. Notwithstanding these circumstances, the relations between the two were not altogether unfriendly; and the father even took some interest later in the son's literary projects.

However, a more lasting glory than that derived from the dignity of an ordinary Lord Chancellor was in store for Bentham. For he now began his settled study of politics, administration, and jurisprudence which became the absorbing occupation of his whole life; and he was destined to produce an enormous body of criticisms, suggestions, speculations, schemes for modifying or entirely reconstructing most of the existing institutions. On the whole, this work, despite its errors, defects, and certain infelicitous attributes, constitutes him the greatest law reformer the world has ever seen. "Though lost to the bar," as a sympathetic critic of utilitarianism says, "he had really found himself. He had taken the line prescribed by his idiosyncrasy. His father's

¹ *Edinburgh Review*, vol. 78 (Oct. 1843), pp. 464, 465.

injudicious forcing had increased his shyness at the bar, and he was like an owl in daylight."¹ But in his literary work no one could be less diffident. And so he "shrank from the world in which he was easily browbeaten to the study in which he could reign supreme."²

We have already seen that the intellectual fare that was provided at Westminster and at Oxford failed to satisfy Bentham. Accordingly he took up what was considered to be the more enlightened philosophy—that represented by the school of Locke—which was antagonistic to prejudice and *a priori* methods of investigation, and in favour of reason, liberty of thought, and the fundamental principle that knowledge depends on actual experience. In addition to Locke he studied Hume and Barrington, Montesquieu, Helvétius, and Beccaria. A good deal of Voltaire he had already read. When he came across the ethical doctrines expounded by Hume, that is, the utilitarian system, he "felt as if scales fell from his eyes."³ Barrington's *Observations on the Statutes* (1766) he esteemed a "real treasure." "I wrote volumes upon this volume," he afterwards observed. For Montesquieu he does not seem to have cared much. Beccaria's *Dei Delitti*, as we have seen in the previous essay, appeared anonymously in 1764, and at once made a great impression in every part of Europe. It presented an apotheosis of the principles of necessity, utility, the greatest happiness of the greatest number. Bentham afterwards apostrophised the Italian writer as his master, who had so greatly helped to make the way clear for the diffusion of reason and light. The *De l'Esprit* of Helvétius, to whom Beccaria himself was so much indebted, exercised a profound influence on the philosophical revolt. It emphasised a moral determinism as against the geographical determinism of Montesquieu. The work was studied far and wide. Bentham tells later on how delighted he was to meet in Bucharest a young man reading it.⁴ Helvétius regarded himself as a disciple of Hume, and so he was especially welcomed in England where his ideas were considered to be little more than her own indigenous production. The greatest happiness principle, which Bentham met with in Beccaria, he came across again, about 1768, in Priestley's *Essay on Government*. He says that at the sight of the formula, he cried out, like Archimedes, as it were in an inward ecstasy,

¹ Sir L. Stephen, *The English Utilitarians* (London, 1900), vol. i, p. 175.

² *Ibid.* ³ *Works*, vol. i, p. 268 note.

⁴ Vol. x, p. 56.

"Eureka." About 1770 he read also Maupertuis' *Essai sur la philosophie morale*, and not long afterwards the *De la félicité publique* (1772) of Chastellux, who borrowed from Priestley and Helvétius. With Chastellux he entered into communication. Of all these writers Bentham afterwards singled out Helvétius, as constituting a distinctive point of departure in his career. For after reading the *De l'Esprit* in 1769, he immediately discovered his true vocation. In his childhood he had once been asked to give the meaning of "genius"; in Helvétius he finds the etymological signification—"gigno," implying production, invention, creation. What, then, he asks himself, is his genius? Besides, which form of genius is the most useful? Helvétius replies for him: the genius of legislation. But has he the genius for legislation? With a trembling voice, he answers "yes" to himself.¹ A few years later, at the beginning of one of his manuscript works (in a fragment entitled *Civil Preface*), he proclaims his essential philosophical point of view, and avows his ambition: "The present work, as well as any other work of mine that has been or will be published on the subject of legislation or any other branch of moral science, is an attempt to extend the experimental method of reasoning from the physical branch to the moral. The moral world has therefore had its Bacon, but its Newton is yet to come." As a result of these studies, Bentham formulated his well-known greatest happiness principle which, as Stephen says, "to some seemed a barren truism, to others a mere epigram, and to some a dangerous falsehood." ■ To Bentham, however, it appeared as an irrefutable truth possessing great potentialities, and capable of illuminating the recesses and ramifications of the entire legislative and administrative system, as well as the political and economic structures.

In 1770 he visited Paris, and made but one or two acquaintances, though he was already styled a "philosopher." In the same year his first publication appeared. It consisted of two letters signed "Irenæus," and printed in the *Gazetteer*, setting forth a defence of Lord Mansfield against attacks arising out of the prosecution of Woodfall, the publisher of Junius' letter to the king. Some four years later he translated Voltaire's *Taureau blanc*, ■ story which, he says, used "to convulse him with laughter." It appears that by this time he shared the French writer's view of the Old Testament. In 1775 he collaborated with John Lind,

¹ Cf. *Works*, vol. x, p. 27.

■ *Op. cit.*, vol. i, p. 275.

a political writer, in a pamphlet (*Remarks on the principal acts of the thirteenth parliament of Great Britain*) which defended the acts of ministers in regard to the American colonies. Bentham states that he was prejudiced against the Americans by reason of their fallacious arguments, and that from the first he regarded the Declaration of Independence as a hodge-podge of confusion and absurdity, in which what ought to be proved is throughout taken for granted.¹ It is at about this time, when Bentham was twenty-six years old, that he says his was "truly a miserable life."² But his mind was now concentrated on his great project. He was busy in 1776 with what he called his capital work, under the originally intended title, *The Critical Elements of Jurisprudence*;³ and here, in the first important example of independent authorship, we already see how his literary labour was constantly interrupted and distributed. Before completing one work, he would start another, and before he got far with this he would take up a third, and so on continuing to the end in a seemingly capricious manner. In reality, he was anxious to make sure of his ground. A doubtful point in the composition of a treatise would bring him for the time being to a standstill, and soon after he would commence a more comprehensive work on the same subject, leading up to and solving what was before doubtful. Sometimes the finished manuscripts were kept by him for two or three years before they were printed, and sometimes, again, their publication was delayed for a period after the printer's work was at an end. Moreover, most of his considerable productions were not published by himself, but were left to the zealous care of friends and disciples, who not infrequently transcribed the materials, rewrote, edited, arranged them, and prepared them for printing and publication. Consequently, in relating the history of his works a certain overlapping of dates is inevitable. Thus, before finishing *The Critical Elements of Jurisprudence* he began the composition of his noteworthy *Fragment on Government*, published it, then returned to the former, worked at it for some time, collected materials for something else, then had *The Critical Elements of Jurisprudence* printed in 1780, but did not publish it till 1789. And this promiscuous activity was

¹ *Works*, vol. x, pp. 57, 63.

² *Ibid.*, p. 84.

³ A convenient bibliography of Bentham's works will be found in A. Siegwart, *Bentham's Werke und ihre Publikation* (Bern, 1910). A brief classification of his works, based on a method of arrangement adopted by Von Mohl, *Staatswissenschaft*, iii, 607, is given in *Dictionary of National Biography*, s.v. *Bentham*, ad fin.

occasionally still more varied by his engaging in quite different work, which, no doubt, offered an acceptable diversion—as, for example, the translation in 1777 of some of Marmontel's *Contes Moraux*. When he commenced writing *The Critical Elements of Jurisprudence* he was twenty-eight years of age; and he now describes himself as seeking and picking his way, overcoming prejudice and nonsense, making a little bit of discovery here, another there, and endeavouring to put the little bits together.

The *Fragment on Government*,¹ published anonymously in 1776, was a remarkable and incisive criticism of Blackstone's *Commentaries*, and more particularly of his views on government. In many respects the year 1776 was a memorable one. With the American Declaration of Independence it marked the inauguration of a new political epoch, and offered a striking example of the fermentation and the more or less visible revolt that were being manifested in many parts of the world. The publication of Gibbon's first volume of *The Decline and Fall of the Roman Empire* signalled a departure in historical science, and the issue of Adam Smith's *Wealth of Nations* constituted a conspicuous landmark in the sphere of economic speculation. Bentham's volume, though it did not create such a profound impression, vigorously proclaimed the necessity to apply scientific methods to problems of government and legislation. The main object of the author was to show Blackstone's hostility to reform, and to lay bare the confusion, the errors, and the fallacies in which the whole of the vaunted *Commentaries* abounded. Bentham had in his earlier days noted the Oxford professor's illogical reasoning, sophistry, and disregard of facts in his endeavour to establish his antiquated theories; and now the critic's esteem was by no means increased for one who, he thought, was "always eager to hold the cup of flattery to the lips of high station." "In the course of a life," says Sir R. K. Wilson,² "which had been divided between the society of an Oxford college and practice as a barrister, Blackstone had acquired a considerable store of miscellaneous erudition, a mastery of elegant language, and ideas in some points of really enlarged benevolence, together with a marvellous faculty for putting plausible glosses on ugly facts, sometimes for making words supply the want of facts, and for flattering or coinciding with the characteristic weaknesses of the society

¹ *Works*, vol. i, pp. 221–295.

² *History of Modern English Law* (London, 1875), pp. 134, 135.

among which he moved. It was the fruit which might naturally have been expected from a system of university education which began with perjury, which offered its chief prizes for exercises in adulation, which systematically repressed every movement towards independent inquiry, and while subordinating substance to ornament, ended by doing almost as little for the latter as for the former." Bentham's *Fragment*, which is singularly free from those terminological excesses and stylistic blemishes that mark his later works, is an excellent specimen of a polemical treatise. It makes a firm stand against the prevailing theories in politics and jurisprudence, so imbued with formalism and unmindful of reality, and seeks to cut away the bonds of tradition and authority. War is declared against the "Demon of Chicane," as well as against "Judge and Co." Blackstone's doctrine of a compact between king and people, ignoring as it did the cabinet and the complete transformation in the relations between sovereign and parliament, was dissected and shown to contain more fiction and verbiage than reality; and to all this as well as to the ideal schemes of mixed government, lauded by him and acclaimed also by Montesquieu, the critic applies his crucial test of utility, of general happiness, and triumphantly shows the underlying fallacy and absurdity of the entire flimsy fabric of the academic apologist.

The anonymous publication was at first foolishly attributed by some to Lord Mansfield, by others to Lord Camden, by others again to Dunning (afterwards Baron Ashburton). It was pirated in Dublin; and most of the five hundred copies were sold, though without profit to the author. Attacks and denunciations were, of course, provoked.¹ When Bentham heard that Wedderburn described the book as "dangerous," he wondered how utility could be dangerous. On later reflection he concluded that the explanation of this puzzle was that what is useful to the governed is not necessarily useful to the governors. Mansfield was reported to have said that in some parts the author of the *Fragment* was awake, and in others asleep. Bentham thereupon suggested that perhaps he was thought to be awake in the parts where Blackstone, the object of Mansfield's personal "heart-burning," was assailed, and asleep when Mansfield's own despotism was threatened. Camden expressed contempt for the author; Dunning only "scowled" at him; and Barré (afterwards paymaster-

¹ Cf. *Works*, vol. x, pp. 77-82.

general under Lord Shelburne), soon after receiving a copy of the book, returned it, saying he had "got into a scrape."

In 1775-6 Bentham was examining the fundamental principles of penology, and wrote his *Rationale of Punishments and Rewards*. But, conformably to the author's peculiar ways explained above, it remained in manuscript form for some thirty-five years, and was first published at Paris by Dumont in 1811, under the title of *Théorie des peines et des récompenses*. In the English form it did not appear till 1825.

In 1778 appeared his pamphlet entitled *View of the Hard Labour Bill*, in reference to a bill¹ introduced into parliament by William Eden (afterwards Lord Auckland), who had had the approval and assistance of Blackstone. In his tract Bentham applies the fundamental principles of his penological theory to the examination of the legislative scheme on the one hand, and to the organisation of a regular penitentiary system on the other. The plan of the architecture and management of a convict prison set forth in the bill was subjected to a severe criticism. It seems that Blackstone afterwards sent the critic a note describing the tract as "ingenious," and adding "that some of the observations had already occurred to the patrons of the bill, and many more were well deserving their attention." The measure was passed in 1779, empowering the building of two penitentiaries, under the supervision of three superintendents. Howard, John Fothergill (physician and Quaker philanthropist), and Whatley (the treasurer of the Foundling Hospital) were appointed to carry out the experiment. A site was at first selected at Battersea, about which they were unable to agree; and on the death of Fothergill in December 1780, Howard resigned. The failure of this project led subsequently to Bentham's elaboration of his extraordinary "Panopticon" scheme, which, as we shall see later, involved its ingenious contriver in a great disaster.

The publication of the *Fragment on Government* is noteworthy, in Bentham's life, for more than its trenchant onslaught on the Blackstonian theory. It attracted the attention of Lord Shelburne (afterwards Marquess of Lansdowne), whose friendship Bentham secured, and on whom the writer's influence was henceforth very great. Lord Shelburne sought out the author, in 1781, at his chambers in Lincoln's Inn; and the relationship thus established was regarded by the latter as a compensation for his

¹ See *infra*, chap. ii, sect. ii.

failure at the bar. "He raised me," said Bentham, "from the bottomless pit of humiliation. He made me feel I was something." The same year Bentham, thus restored to good humour and spirits, paid a visit to Bowood, where he met some of the leading notabilities of the time, such as young William Pitt and his elder brother Lord Chatham, Lord Camden, Dunning, Colonel Barré and others. Pitt, then twenty-two years of age, was afterwards described by Bentham as a very good-natured fellow, but a little raw, showing in his conversation nothing of the orator. "I was monstrously frightened at him," he observes, "but when I came to talk with him, he seemed frightened at me."¹ (The author himself was then thirty-three.) Lord Camden, the ex-Lord Chancellor, was, in the view of Bentham, a hobbledehoy and devoid of polished manners, the tone of his address being marked by "coldness and reserve." Dunning (the future Lord Ashburton), who had held the office of Solicitor-General, was regarded by him as a narrow-minded man and a mere lawyer. Bentham was nothing if not critical. He did not see what ideas he could have in common with these politicians. "All the statesmen," he thought, "were wanting in the great elements of statesmanship"; they were always discussing "what was," and never, or seldom, "what ought to be."² It appears that sometimes they made a little fun of the shy and sensitive guest.³ The ladies, however, were very considerate to him. Shelburne made him read his "dry metaphysics" to them;⁴ and they evidently bore the—to them—novel infliction with truly feminine submission. Lady Shelburne, in particular, showed herself favourably disposed to him. She even allowed him the "prodigious privilege" of admission to her dressing-room; and though outwardly haughty, she was in reality mild enough to indulge in "innocent gambols" with her sister Lady Mary Fitzpatrick (wife of Stephen Fox, afterwards Lord Holland). Occasionally he wrote letters to the ladies "in the tone of elephantine pleasantries natural to one who was all his life both a philosopher and a child."⁵ It is especially worthy of note, as a fact throwing light on Bentham's real character and disposition, that in her last illness he was one of the only two men she would see; and that after her death (1789) he was the only man to whom her husband (then Lord Lansdowne) turned for consolation.

¹ *Works*, vol. x, p. 100.

■ *Ibid.*

² Vol. x, p. 118; cf. vol. i, p. 253.

⁴ Vol. x, p. 97; cf. vol. i, p. 252.

⁵ Stephen, *op. cit.*, vol. i, p. 185; cf. *Works*, vol. x, pp. 219, 265.

It may be here related that Bentham's visits to Bowood came to be coloured with the roseate hue of romance. It was an experience of one of those very few "*deverticula amœna*" that relieved the monotony of his long, arduous literary life. But in his case, alas! the pleasant bypath did not culminate in the desired goal. Miss Caroline Fox, the daughter of Lady Mary, and the niece of Lady Lansdowne, aroused in Bentham what was perhaps his nearest approach to passion. It appears that Lord Shelburne was desirous that Bentham should marry Lady Ashburton, widow of Lord Ashburton¹ (Dunning had been created a baron in 1782 and died in the following year); indeed, Bentham asserted that his worthy host had several projects for marrying him to ladies of his acquaintance. But to Miss Fox he ever remained constant, though he lost sight of her for some sixteen years. In 1805, at the age of fifty-seven, he met her again on the occasion of the death of Lord Lansdowne, and took the opportunity to make an offer of marriage.² She refused the proposal, in a letter full of friendliness and regret. Again in 1827 the old man of near eighty sent his last love-letter, which breathes mingled feelings of tenderness and pride. "I am alive," wrote the octogenarian philosopher, ". . . more lively than when you presented me, in ceremony, with the flowers in the green lane. Since that day not a single one has passed (not to speak of nights) in which you have not engrossed more of my thoughts than I could have wished. Yet take me for all in all, I am more lively now than then. . . . You will not, I hope, be ashamed of me. The last letter I received from Spanish America (it was in the present year) I was styled '*Legislador del Mundo*,' and petitioned for a code of laws. . . . Every minute of my life has been long counted; and now I am plagued with remorse at the minutes which I have suffered you to steal from me. In proportion as I am a friend to mankind (if such I am, as I endeavour to be) you, if within my reach, would be an enemy."³ Much may be forgiven the disappointed man who preserved, through the drudgery and toil of forty years, such extraordinary constancy of a first love.

Let us now turn back from this sentimental interlude in Bentham's life to his more serious occupation.

During his stay at Bowood he devoted much time to the preparation of one of his greatest and most characteristic works, *The Introduction to the Principles of Morals and Legislation*,

¹ *Works*, vol. i, p. 253.

² Vol. x, p. 419.

³ *Ibid.*, p. 558.

which was begun in 1776 as *The Critical Elements of Jurisprudence*, printed in 1780, and under its new title was given to the world in 1789. It is the one large work published by himself. The author intended it to embody the principles of all his future labours. He pointed out ten departments of legislation, for each of which a separate treatise would be necessary to carry out his entire plan. The treatise presents on the one hand a full exposition of the principle of utility, which is to be the essential criterion both for the legislator and the moralist, and on the other a trenchant criticism of other principles that had been advanced, especially those of asceticism, "sympathy," "moral sense," "natural justice," "law of nature." He asserts that happiness is the sole aim of man, shows the dependence of conduct on the sovereign factors of pleasure and pain, gives a classification of "springs of action," shows how the value of pleasure and pain is to be measured, and expounds the nature of the "sanctions"—physical, political, moral or popular, and religious—as weapons in the hands of the legislator to be used for modifying "motives." He considers what acts are to be deemed crimes and the reasons therefor. The aim of legislation being to secure the greatest happiness of the community, it follows that punishment in itself is an evil, and is admissible only if it promises to prevent a greater evil. He examines the cases where it ought not to be inflicted, the question of proportioning punishments to offences, the considerations to be weighed in fixing penalties, then the limits that are to be imposed on legislative intervention, and thus distinguishes the sphere of ethics from that of jurisprudence.

In 1783 he translated a book by T. O. Bergman, the Swedish scientist, on the usefulness of chemistry.

About this time his younger brother Samuel, a naval engineer, was employed in the service of Prince Potemkin, prime minister of Catherine II of Russia, to superintend shipbuilding works at Kritchev on a tributary of the Dnieper; and the rank of colonel was conferred on him. In 1785 Jeremy paid a visit to his brother in Russia, and even there maintained his irrepressible literary activity. He sent home (Dec. 1786), in the form of letters addressed to a friend George Wilson, his *Defence of Usury*, in favour of contractual liberty respecting money transactions. "You know it is an old maxim of mine," he wrote, "that interest, as love and religion and so many other pretty things, should be free."¹ The

¹ *Works*, vol. x, p. 167.

work was published in 1787, and was soon translated in several languages. Bentham assailed the prohibitory laws, and discussed the remarks on the subject made by Adam Smith in his *Wealth of Nations*, which he considered to be a work that would rise the more in public esteem the more genius was held in honour. The critic, however, noticed among the "precious and irrefragable" truths expounded there a notable fallacy, namely Adam Smith's approval of the five per cent. restriction prescribed by a statute of the reign of Queen Anne—an approval which was obviously inconsistent with the general principles laid down by him. The distinguished author of *The Wealth of Nations* thought Bentham's tract to be the production of a superior mind, and that his contention was right. Others spoke of it as a "gem of the first water." J. S. Mill observed that all enlightened persons have condemned the statutory limitations on interest "since the triumphant onslaught made upon it by Bentham in his letters on Usury, which may still be referred to as the best extant writing on the subject."¹ (It may be added here that the usury laws were abolished in 1854.) In addition to these writings on usury, Bentham sent from Russia a series of letters on his much cherished penitentiary project, which will be dealt with presently.

Bentham returned to London in February 1788, settled at a small farmhouse at Hendon, purchased a "superb harpsichord," and recommenced his work. The same year he met Romilly and Dumont at Lord Lansdowne's table.² The former's acquaintance he had already made in 1784; but now their relationship became more intimate. Romilly, like other discerning spirits, was struck by the *Fragment on Government*, and readily lent a sympathetic ear to the author's penological views. He became, informally, Bentham's legal adviser, especially in regard to the publication of such writings as exposed the author to the wrath of constituted authority and to the action of the courts; and, what was much more important, he acted during his distinguished career in Parliament as the principal expounder and advocate of his friend's penal theories.³ The friendship established with Dumont was similarly destined to produce rich fruit. Étienne Dumont was born at Geneva in 1759, became a Protestant minister of the French Church at St. Petersburg in 1783, two years

¹ *Principles of Political Economy*, bk. iv, chap. x, § 2.

² *Works*, vol. x, p. 186.

³ The relation of Romilly's views to Bentham's will be seen in the third essay.

later accepted the tutorship to Lord Lansdowne's sons, in 1788 visited Paris with Romilly and made the acquaintance of Mirabeau. Romilly showed some of Bentham's papers, partly written in French, to Dumont, who offered to rewrite them and see to their publication. Afterwards Bentham himself sent more manuscripts to Dumont, who by his labours of arranging, supplying *lacunæ*, condensing, abridging, translating, and editing a large portion of the English author's writings, became a noteworthy apostle of Benthamism. It may be here mentioned that Dumont is said to have supplied Mirabeau with materials for some of his "most splendid" speeches; and part of these materials undoubtedly came from Bentham.¹ Ultimately the two friends became so much alienated that Bentham, in 1827, refused to see Dumont, and observed that his disciple did "not understand a word of his meaning." Bowring states that the cause of the breach was something Dumont said about the shabbiness of Bentham's dinners as compared with Lord Lansdowne's, and describes the comparison "as offensive, uncalled-for, and groundless."²

Before and during the Revolution, Bentham was keenly interested in French affairs, about which he was kept well informed by his friends in France. Lord Lansdowne expressed his pleasure, January 3, 1789, on hearing that Bentham intended "to take up the cause of the people in France."³ Our author was already known to some of the leading French spirits. To the Abbé Morellet (who was ever ready to enter into communication with foreign sympathetic writers and thinkers, and whose connection with Beccaria we have already seen) he forwarded a portion of his treatise on *Political Tactics*, which he hoped to complete by the time of the meeting of the States General.⁴ It contained a detailed account of the necessary organisation and procedure of a legislative body, and was based, in the main, on the practice of the House of Commons. It was not published, as usual, till long afterwards. Dumont issued it in 1816, along with the *Anarchical Fallacies*, a trenchant criticism of the "Declaration of Rights." Following up his communication on legislative procedure, he published, March 1790, an elaborate project for the organisation of the French judiciary. The following year he offered to go to France, for the purpose of establishing a prison on the

¹ Cf. *Works*, vol. x, p. 185.

² *Ibid.*, p. 195.

³ *Ibid.*

⁴ *Ibid.*, pp. 198, 199.

lines of his ill-fated Panopticon plan (which will shortly be dealt with), and was prepared moreover to become "gratuitously the gaoler thereof."¹ The Legislative Assembly signified their acknowledgment of his "ardent love of humanity," and ordered an extract from his scheme to be printed for their instruction. "He was in fact proposing that the lava boiling up in a volcanic eruption should arrange itself entirely according to his architectural designs. But his proposal to become a gaoler during the revolution reaches the pathetic by its amiable innocence."²

Throughout the whole revolutionary epoch he took no part in the violent polemical proceedings. As to the Jacobin doctrines he adopted an attitude of "hostile indifference."³ His theory regarding property, inspired by Hume, insists on "security" as an indispensable principle, indeed as the predominating one; so that while recognising the principle of "equality," he holds that when the two are antagonistic to each other, the latter must give way to the former. Security lies at the very basis of life, subsistence, abundance, happiness; but the notion of absolute equality is a chimera—all that is possible is to try to lessen inequality.⁴ His *Anarchical Fallacies* was designed to act as a check on the republican propaganda, by exposing, among other matters, the fallacies inherent in the theory of natural rights. "Natural rights," he says, "is simple nonsense; natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense; for immediately a list of these pretended natural rights is given, and those are so expressed as to present to view legal rights."⁵

At about this period, say in 1790, Bentham seems to have been considering the advisability of entering parliament, and with this view had actually prepared in advance addresses to electors. In 1788 the Marquess of Lansdowne had made certain overtures of patronage to him, which were declined. Some two years later Bentham got it into his head that his noble friend had offered him a seat in the House of Commons, and wrote him an enormous argumentative letter of sixty pages expounding his claims thereto.⁶ Lansdowne replied that he had not made the imagined promise, but had all along assumed that Bentham

¹ *Works*, vol. x, p. 270.

² Cf. Halévy, *op. cit.*, vol. ii, p. 20.

³ Vol. ii, p. 501.

⁴ Stephen, *op. cit.*, vol. i, pp. 197, 198.

⁵ *Works*, vol. i, p. 311.

⁶ Vol. x, pp. 228–242.

preferred a retired life to a political career. Bentham accepted the reply with frankness and in a friendly manner.

In March 1792 his father died, leaving his property equally to his two sons. Jeremy's portion consisted of the house, etc., at Queen's Square Place, Westminster, and of landed estate producing some five or six hundred pounds a year. For the remainder of his long life—save for a short period—he lived at Queen's Square Place. He particularly delighted in the garden, which contained the small house once occupied by Milton.¹ And now, thanks to his augmented income and to the engineering skill of his brother, he was ready to set forth his penitentiary views in the form of the grand Panopticon plan.

For a long time Bentham had been interested in prison reform, which the self-sacrificing labours of John Howard had so forcibly shown to be a matter of urgent necessity. (After the American Declaration of Independence transportation to America had, of course, become impossible.) With respect to Howard's writings on prisons, Bentham thought they supplied a rich fund of materials, but that a quarry was not a house; they contained rules or suggestions for prescribing rules, and various recommendations the reason of which was not always apparent, but there were no fundamental principles, and no systematic order. "My venerable friend," he continued, "was more usefully employed than in arranging words and sentences; his kingdom was a better world—the labours of the legislator or the writer are as far below his as earth is below heaven."² We have already referred to the attempt at some solution made by Blackstone and Eden's bill (1778), the criticism of Bentham (1779), and the early failure of the project (1780). Bentham now hoped to solve the problem with his unique scheme, providing for the erection of an extraordinary house of detention. He first got his idea of such an "inspection house" during his stay with his brother in Russia. A building of this character had been planned by the latter to facilitate the superintendence of his Russian shipwrights; and Bentham apparently thought there was but little difference between shipwrights working voluntarily for pay and convicts working compulsorily in penal servitude. Why should not, then, a similar plan be applied to prison organisation? Numerous letters were at once despatched to his friends in England on the subject, and after his return it occupied his attention

¹ *Works*, vol. xi, p. 81.

² Vol. iv, p. 121.

for many years, and provoked a good many tracts, pamphlets, discussions, communications with friends, statements and appeals to members of parliament, and to the ministers concerned, and even to the king himself. Bentham was very sanguine as to the results of his project. He begins one of his writings on the subject thus: "Morals reformed, health preserved, industry invigorated, instruction diffused, public burthens lightened, economy seated as it were upon a rock, the Gordian knot of the poor laws not cut but untied, all by a simple idea in architecture."¹ In 1791 he printed an account of the Panopticon,² and sent a description of it to George III. It was to be a circular or polygonal building, containing cells on every story of the circumference, and so arranged that by means of a number of reflectors every part could be visible from the centre. The inspector, occupying a lodge in the centre, and concealed from the prisoners, would himself be able to see them all and give directions without having to quit his post—an arrangement calculated to beget "the sentiment of an invisible omniscience." In addition to this architectural conception of central superintendence, Bentham made a proposal for contract management, as opposed to trust administration, conformably to his theory described by him characteristically as the "interest-and-duty-junction-prescribing" principle. That is, a contractor was to undertake the maintenance of the prisoners at a fixed sum per head, and keep for himself whatever profits might accrue from their labour, the nature of which was left to his choice. As the amount of profits would depend, to a large extent, on the orderliness and industry of the prisoners, the governor would therefore teach them the most profitable trades, and give them a part of the profits as an inducement to diligent labour. Thus he would combine in his own person the characters of magistrate, inspector, manager of a manufactory, and head of a family. Further, the manager was to insure the lives and safe custody of all who were placed in his charge; in other words, he would be liable to pay a sum for every one, beyond a certain average, lost to the prison by death or by escape. Finally, to emphasise the responsibility of the director and keep a check on his doings, authorised magistrates were to have access at all times to the Panopticon, and the public at certain hours. This was the essential organisation that was to achieve the glorious objects so hopefully contemplated by our ingenuous author

¹ *Works*, vol. iv, p. 39.

² Vol. i, pp. 498-503.

Forwarding a copy of the scheme to his friend Brissot in Paris, he described his Panopticon penitentiary as "a mill for grinding rogues honest, and idle men industrious."¹ When Burke was shown the plan he turned towards its author, saying: "Yes, there's the keeper—the spider in his web!" Dr. Parr—a sort of Whig Johnson—who was, in the words of Romilly, Bentham's "profound admirer and universal panegyrist," did his utmost to obtain the sympathy of Charles James Fox with the scheme and the author. Pitt also was favourably impressed; he examined the models at Bentham's house, and promised to secure a practical trial for the project.²

In March 1792 Bentham laid a proposal before the government, offering to undertake the custody of a thousand convicts on the Panopticon system. Parliament viewed the scheme with favour, and passed an Act in 1794³ which adopted it, and sanctioned the acquiring of sites for penitentiary houses. Meantime Bentham had been making preparations; and though his income was less than six hundred pounds, he had spent by September 1794, as he said,⁴ six thousand pounds, and continued to spend at the rate of two thousand a year. The government made him a grant of two thousand pounds, which was required to keep together the men he employed. His brother Samuel had designed machinery for working in wood and in metal. Instead of working a steam-engine it was thought best to utilise the hands of convicts, and so to combine business with philanthropy. Next came difficulties in getting a suitable site; the one obtained under the provisions of the Hard Labour Act of 1779 being for some reason rejected. Bentham was almost in despair. Wilberforce had throughout stood by him; and his zeal and sympathy were a striking contrast to the procrastination of Pitt and the ill-mannered conduct of lesser men. The great abolitionist, in an entry in his diary, 1795, described "poor Bentham" as "dying of sickness of hope deferred." In 1797 a committee was appointed, which received evidence as to the Panopticon from Bentham's friend, Patrick Colquhoun (a notable London police-magistrate, devoted to reform), and a report in its favour was proposed by a friend of Samuel Bentham. Accordingly, two years later a site was bought by Jeremy for twelve thousand pounds at Millbank;

¹ Vol. x, p. 226.

² As to the Panopticon penitentiary, see further *infra*, chap. iv, sect. iii, *in fin.*

³ 34 Geo. III, c. 84.

⁴ *Works*, vol. x, p. 301.

but the warrant for the remaining sum of one thousand pounds (to buy out the tenant of one piece of land) never came, as the king had refused the sign manual to complete the purchase. For a time Bentham struggled on, making appeals in every promising quarter, but in vain. Finally, in 1811 a committee reported against the entire scheme, intended to confer on private individuals such wide powers as the control of education, and the liberty to impose permanent marks on the inmates for personal identification, and especially condemned the principle of drawing profit from the labour of prisoners. Indeed, both in gaols and work-houses "farming" had led to gross abuses. A different plan was therefore recommended, which resulted in the establishment of the Millbank penitentiary (1816). Bentham's disappointment may well be imagined. Through the dilatory measures of officialdom, through the unbusinesslike methods of the authorities in allowing him to go so far and implicate himself in great expenditure and liability, Bentham found himself left in the lurch and impoverished. "Never was anyone worse used than Bentham," wrote Wilberforce; "I have seen tears run down the cheeks of that strong-minded man through vexation at the pressing importunity of creditors and the insolence of official underlings, when, day after day, he was begging at the Treasury for what was, indeed, a mere matter of right. How indignant did I often feel when I saw him thus treated by men infinitely his inferiors." However, in 1813 Bentham received a sum of twenty-three thousand pounds as compensation for his heavy losses. "Oh! how grating," exclaimed he, "how odious to me is this wretched business of compensation! Forced after twenty years of oppression—forced to join myself to the *Baal-peor* of blood-suckers, and contribute to the impoverishment of that public to which, in the way of economy, as well as so many other ways, I had such well-grounded assurance of being permitted to render some signal service." Notwithstanding the opposition he met with, and his complete failure to realise his long-cherished project, he none the less wrote a defence of it, of which part was published under the title of *History of the War between Jeremy Bentham and George the Third. By one of the Belligerents*.¹ Bentham believed that the scheme failed chiefly because of the king's dislike for him. "As to the criminally offending part of the nation," he writes sardonically in a passage that will give some

¹ *Works*, vol. xi, p. 96.

indication of the effects of his disappointment, "no tamer of elephants had a better-grounded anticipation of the success of his management than I had of mine, as applied to the offending school of my scholars. Learned and right honourable judges I would not then have undertaken—I would not now undertake—to tame; learned gentlemen in full practice I would not have undertaken to tame; noble lords I would not have undertaken to tame; honourable gentlemen I would not have undertaken to tame. As to learned judges under the existing system, I have shown to demonstration . . . that (not to speak of malevolence and benevolence) the most maleficent of the men whom they consign to the gallows is, in comparison with those by whom this disposition is made of them, not maleficent, but beneficent." Although Bentham's expectations were frustrated, it must be admitted—and we shall see this more clearly in a subsequent chapter—that he remains one of the greatest pioneers of prison reform, and a worthy successor to the immortal Howard.

The Panopticon scheme had by no means monopolised our author's attention. Indeed, the decade 1790–1800 was one of the most fertile periods of his literary activity, and saw the production of some of his most notable works. In 1792 he wrote *Truth v. Ashhurst, or Law as it is contrasted with what it is said to be*,¹ which was a trenchant review, in the form of a running commentary, of the constitutional doctrines laid down by Mr. Justice Ashhurst in a charge to the grand jury of Middlesex. In his panic-stricken aversion from the French Revolution, the judge had eulogised the English laws; and his charge had been published under the auspices of the then Constitutional Association and widely circulated. Bentham's resolute hostility to Jacobin methods did not in the least lessen his antagonism to English superstitions and effete traditions: "Why is it," he asks, "that in a court called a court of *equity*, they keep a man his whole life in hot water, while they are stripping him of his fortune?" To urge reforms publicly at this time, especially in the pungent language of the vigorous critic, was rash; so that the pamphlet was not published till some thirty years later. It was Romilly who had counselled discretion, and thus helped, as he did on other occasions, to avert disaster so carelessly courted by Bentham.

In August 1792 the honour of French citizenship was, on the motion of his friend Brissot, conferred on him by the expiring

¹ *Works*, vol. v, pp. 231 seq.

National Assembly. On the same occasion a like distinction was bestowed on a few other distinguished foreigners, who had served the cause of liberty—Wilberforce, Clarkson, Priestley, Washington, Paine.¹ The September massacres followed. On October 18 the honour was communicated to Bentham, who, in a polite reply, remarked that he was a royalist in London for the same reason that would make him a republican in France, and concluded with a calm argument against the proscription of refugees.² It would be interesting to know how the Convention took the letter of citizen Bentham, their would-be guide and instructor. Next followed the war and the Reign of Terror. Violent measures were repugnant to him; and so we find him writing to a friend on October 31, 1793, expressing his wish that Jacobinism were extirpated. "Never," comments a friendly critic, "was an adviser more at cross-purposes with the advised. It would be impossible to draw a more striking portrait of the abstract reasoner, whose calculations as to human motives omit all reference to passion, and who fancied that all prejudice can be dispelled by a few bits of logic."³

In reference to the question of national taxation, various plans suggested themselves to him, such as those involving the improvement of the system of patents, the reorganisation of joint-stock companies, etc. In 1793 he offered his services to Dundas, the Home Secretary, for the drafting of statutes; and he incidentally observed that he could legislate for Hindostan, if legislation were wanted there, just as easily as for his own parish.

About this time were written and printed (but not published till 1795) two remarkable pamphlets. The first was entitled *A protest against law taxes showing the peculiar mischievousness of all imports which aggravate the expense of appeals to justice*.⁴ It is an excellent example of our author's best style, of his close, logical, and forcible reasoning; he easily demolishes the object of his hatred. He declares that taxes on commodities for consumption fall on bodies of men fully able to protect themselves, whilst taxes on justice fall on the oppressed and ruined, who are condemned to weep alone in holes and corners. It was calculated that the cost of an action to recover a trifling sum amounted, on the plaintiff's side alone, to about twenty-four pounds; and at the time Bentham launched his criticism, an increase of the

¹ *Works*, vol. x, p. 281.

² Stephen, *op. cit.*, vol. i, p. 199.

³ *Ibid.*, p. 282.

⁴ *Works*, vol. ii, pp. 573-583.

taxes on legal proceedings was imminent. Even to those who had the means to pay, urged he, such an imposition was grievous enough; to poorer people it amounted practically to a denial of justice. Magna Carta says that justice shall be denied or sold to no man; whereas to nine-tenths of the people it is denied, and to the remaining tenth it is sold at an unconscionable price. The second pamphlet is *Supply without Burden, or escheat vice taxation, being a proposal for the saving of taxes by an extension of the law of escheat, including strictures on the taxes on collateral succession comprised in the budget of 7 December, 1795*.¹ This is also a notable specimen of political argument. In the case of a man dying intestate and leaving only distant relations, Bentham proposed to draw the line at degrees beyond which marriage is permissible. Whilst the laws of succession prescribing the devolution of an intestate's property on members of his family conformed to the principle of utility, the exclusion of more distant relatives would impose no hardship on anyone, and would at the same time add to the resources of the national treasury. Supply without burden, exclaimed Bentham, is victory without blood.

In 1796 Bentham urged the desirability of an amicable understanding with France, and suggested that an attempt should be made to achieve that end. He even proposed that he and Wilberforce should be despatched to France to conduct the necessary negotiations.

In 1798 we find him corresponding at great length with his friend Patrick Colquhoun, in regard to plans for the amelioration of the metropolitan police system.² The latter, besides issuing numerous pamphlets, had three years before published his noteworthy work, *Police of the Metropolis*, a valuable source of information, to which subsequent writers have been much indebted. Various other matters occupied Bentham's attention at this time; of which the most important was the question of the poor laws. In the latter half of the eighteenth century the poor law was marked by serious maladministration and abuses by justices. The strict principles of the Elizabethan law were gradually relaxed. The labour test was being set aside, and outdoor relief in money was given to the able-bodied as well as to the infirm. The workhouses were managed badly. Gilbert's Act, 1782, intended as a palliative to relieve the distress caused by the recent war, recognised outdoor relief, ignored the workhouse

¹ *Works*, vol. ii, pp. 585-598.

² Vol. x, p. 329.

test, and therefore conduced greatly to engender pauperism. The government had come to look upon the poor laws as a means of preventing discontent from developing into despair and revolution. In 1795 poor rates were used to supplement wages, —a practice which of course brought about an enormous rise in the amount of poor rates levied. Measures that were palpably ill-advised were favoured, even by responsible ministers. In 1796 Pitt actually introduced a bill proposing to supply cows to respectable paupers. But this project was afterwards abandoned, owing chiefly to the forcible criticism of Bentham, who was almost the only one to grasp the entire condition of things, to detect the defects, and suggest feasible remedies. The manuscript of his brilliant *Observations*¹ on the bill had been submitted to its promoter (early in 1797), who was no doubt enlightened by the luminous argument. (It appears that the manuscript remained unpublished till 1838, when Edwin Chadwick, the able poor law commissioner, had it printed as a pamphlet for private circulation.) Bentham denounced alike plans favouring "equalisation," and those savouring of "sentimentalism." He insisted on a rigid application of the labour test, the separation of incorrigible vagrants from the "deserving" poor susceptible of improvement by educational processes, and the alteration of the settlement system, which, first devised in 1674, had prevented the emigration of superfluous labour from over-populated districts. As usual, he was not satisfied to remain a merely destructive critic. In the autumn of 1797 he made public a scheme, *Succedaneum to Pitt's Poor Bill*, which appeared in Arthur Young's *Annals of Agriculture*.² He suggested that a uniform national system should be established under the control of a non-official board, acting on a contractual basis (as in the Panopticon scheme), that beggars and other vagrants should be placed in workhouses and made to work, unless they could find security that they would engage in labour elsewhere, that "Frugality Banks" should be organised, and the transfer of small sums from place to place facilitated. In everything his wonderfully fertile mind descended to the utmost details, even suggesting, for example, the materials of which paupers' beds should be made. And despite the impracticability of some of his multitudinous suggestions, he

¹ *Works*, vol. viii, pp. 440-461.

² Cf. *Tracts on Poor Laws and Pauper Management*, in *Works*, vol. viii, pp. 361-431.

remains one of the most eminent pioneers—as is shown clearly by the provisions of the Act of 1834—of poor law reform, and the source whence ideas and plans were afterwards derived for many relative institutions. “. . . His ideas as to the treatment of paupers,” says Sir John Macdonell, “are marvellous, considering the time when they were propounded, and the dangerous nonsense which was in fashion among his contemporaries.”¹

Next Bentham helped in the drafting of a bill, which eventually became the Thames Police Act, 1800. He also prepared a scheme for the prevention of forgeries. In November 1800 he contributed a letter to Cobbett's *Peter Porcupine*, on the most convenient method of taking the census; and the authorities availed themselves of some of the hints thrown out by him. Further, he made a proposal for converting stock into Annuity Notes, which would be better than the Exchequer Bill system, and which would confer a benefit also on small holders.

Now we come to an important date—1802—in Bentham's career. For over a quarter of a century he had been pursuing the occupation of author and social reformer. He had met some of the leading politicians, writers, and philanthropic workers of the time; his name was known also abroad; and he had certainly made his mark. But his reputation was not yet by any means widespread. He avoided society, preferring to live the retired life of a literary hermit; he was satisfied with a limited circle of friends, including men like Wilson and Romilly, themselves of retiring disposition. To Fox he declined to be introduced, on no other ground than that he had “nothing particular to say” to the distinguished statesman; and he thought that to be “always a sufficient reason for declining acquaintance.”² However, the era of Bentham's fame was now to begin. And the initial impetus was due to the former Genevese pastor. We have already seen how Dumont was introduced to Bentham, whose manuscripts captivated his attention. By his zealous care he was able, in the spring of 1802, to give to the world the remarkable *Traité de législation civile et pénale*, in three volumes issued at Paris. The work was in part a translation of Bentham's unpublished manuscripts and of some of his published writings, and partly also a clear, systematic, logically arranged exposition in Dumont's own simpler language of the legislative doctrines

¹ *Dictionary of National Biography*, s.v. *Bentham*.

² *Works*, vol. x, p. 62.

advocated by the great apostle of utilitarianism. It comprised "Principes du code civil," "Principes du code pénal" (which will be analysed in a later chapter), "Principes de législation," and other matters. It was in fact a comprehensive survey of a wide field, hitherto but little examined, and never with such insight and originality. English jurisprudence—European and American, too—is greatly indebted to Bentham's ideas. Many ameliorations in the modern system of law and legal administration are directly traceable to the reasoning of the hermit of Queen's Square Place. His point of view was wellnigh revolutionary. He thrust aside the mere technicalities of law, the factitious and irrational maxims, masquerading as creatures of enshrined wisdom, he put away the fictions so beloved of the judicial pedant, and rejected those unreal phantasmal entities of law as being an obsession destructive of the true interests of the community. To him law was no mystery, but a simple, intelligible, practical means to a realisable end. A particularly valuable portion of the work is his treatment of the foundations of penology. At a time when what is now rightly considered a petty offence was punishable with death, it needed no little daring to urge openly, vigorously, persistently, doctrines of a revolutionary character. What kind of doctrines these were and the nature of the proposed transformation we shall see later.

The success of this publication was immediate and extraordinary. Copies soon found their way to many lands and to the most distant shores. When Dumont visited St. Petersburg in the following year, he sent home enthusiastic accounts of Bentham's increasing reputation.¹ The work had a considerable circulation in Russia, where digests and codes were in course of preparation; and it was thought Bentham's treatise would furnish therefor the essential guiding principles. A Russian translation too was ordered. The book was taken up in Germany, Spain, Portugal, Italy, Greece, United States, and even South America; and in all these countries legislators and draftsmen sought aid from the *Traité*s. Bentham quickly acquired renown, and came to be classed with Bacon, Newton, and Adam Smith—"each the founder of a new science."² In our own country there were carping critics and prejudiced opponents. The *Edinburgh Review* in an article on the work treated it—to use the words of Dumont—with "scandalous irreverence."³ The re-

¹ *Works*, vol. x, pp. 406, 410, 413.

² Cf. *ibid.*, p. 419.

³ *Ibid.*, p. 415.

viewer said it did not realise the "triumphant introduction" of the editor; he called it a great work, but deplored some of the author's views and ridiculed others; and, adopting a superior attitude, declared that "if there is little that is false or pernicious in this system, there is little that is either new or important." Three years later the same Review came to propose that Bentham should be employed in the reform of the Scottish judicial system.

In 1807, in connection with a bill for amending the Court of Session in Scotland, Bentham addressed a series of papers to Lord Grenville (who had invited his assistance), in which he criticised the project, and forcibly condemned the condition of things then existing in Scotland—the great expense, the undue delay, the complicated and labyrinthine pleadings laid before the judges. He then expounded his views on the best legal procedure, emphasised the advantages of what he called the natural system of justice, as opposed to the artificial "fee-getting system," and urged that litigants ought to have ready access to a court, and to be allowed to dispose of the matter in dispute without a jury.¹

The English law of libel was next subjected to a keen investigation in his more elaborate work entitled *Elements of the art of packing as applied to special juries*² (1809), which had been printed but, on the advice of Romilly, not published till 1821. The existing law relating to libel was a special object of the author's detestation—as may well be imagined from his proneness to free expression. The chief aim of the judge, he averred, is ease. "But, so far as jury-trial is concerned, the ease of the judge is as the *obsequiousness* of the jury. . . . For the exhibition of the triumphs of this tyrant passion [viz. vengeance], and the sacrifices made to it, the *King's Bench* is, by *patent*, the great and sole *King's theatre*; the liberty of the press, its victim; *libel law*, the instrument of sacrifice."³

Towards the end of the year 1810 he communicated to William Cobbett his *Catechism of Parliamentary Reform*,⁴ written the year before. It was intended for publication in the *Weekly Political Register*; but it was rejected. It was issued in 1817, with a long introduction showing the "necessity of radical, and the inadequacy of moderate reform." It urged the exclusion of placemen from the House of Commons, the holding of annual elections, the

¹ *Works*, vol. v, pp. 1-60.

³ *Ibid.*, pp. 90, 91.

² *Ibid.*, pp. 61-186.

⁴ Vol. iii, pp. 433-557.

establishment of uniform electoral divisions, voting by ballot, the systematic publication of parliamentary debates, and the granting of the franchise to all who paid a certain amount of taxes. Bentham had come of a tory family, and in his earlier days he was by no means a "radical" in politics. But with the conception of the fundamental greatest happiness principle, his point of view altered; and he became convinced that his ideals would be more easily realised under a democratic government. His estimate of Cobbett, who was at this time imprisoned for his violent attack on the flogging of militiamen by German mercenaries, was far from flattering. Whether the strong antipathy to him was in a great measure due to his rejection of the manuscript it is difficult to say. Certain it is that anyone who crossed Bentham would soon "know the reason why." No doubt the attitude, opinions, and methods of the agitator did not commend themselves to the utilitarian philosopher. It was not Bentham's way to mince matters. Not only did he like to call a spade a spade; but in his linguistic exuberance he sometimes exaggerated and called it a worse than shovel. Thus his present view of Cobbett is summed up in his terse phrase, "vile rascal";¹ afterwards the latter was considered to be "filled with the *odium humani generis*—his malevolence and lying beyond everything."²

In 1814 Bentham removed from London to Ford Abbey (near Chard), which was an old stately mansion beautifully situated, and was occupied formerly as a monastery. The historic edifice of the reign of Stephen and the attractive surroundings did not hinder Bentham in the untiring prosecution of his labours. Romilly, who visited him in 1817, speaks of the cheerfulness and magnificence of the princely mansion, the gay pleasure-grounds, the spacious rooms, some of them enriched with tapestry, "the modesty and scantiness of his domestic establishment" (how could a poor bachelor do better?), and says that the retired occupant of the abbey devoted seven or eight hours a day to his writing, and the remaining hours to reading or taking exercise.³ Bentham remained here about four years.

He next engaged for some two or three years in educational and religious controversies. In 1816 was published *Chrestomathia, or useful education*,⁴ a series of papers in which the Bell and Lancaster systems of instruction are applied to secondary edu-

¹ *Works*, vol. x, p. 471.

³ Romilly, *Memoirs*, vol. iii, pp. 315-317.

² *Ibid.*, p. 570; cf. vol. xi, p. 68.

⁴ *Works*, vol. viii, pp. 1-191.

cation. He combats the high claims made by votaries of the classics, and insists on the great importance of scientific subjects in the educational curriculum. He was ever ready to apply theories to actual practice. He encouraged practical schemes not only by his sympathy and advice, but also by substantial aid; thus he generously offered his garden as a site for the erection of a school. In those less enlightened days educational controversy was embittered by religious animosity. Now Bentham accepted no theology. In his *Church of Englandism and its Catechism* (published 1818) he showed himself an opponent of the Church and objected to the Catechism; he pointed out the fallacies in the Thirty-nine Articles, dilated on the evils of clericalism and the abuses consequent on episcopal wealth and non-residence, and regarded the entire ecclesiastical organisation as part of the prevailing fabric of mischief and anomaly, which elsewhere had brought into being "Judge and Co." He thought that the duties of a clergyman, namely, to read weekly services and preach sermons, might well be performed by a parish boy, instructed to read properly and provided with the prayer-book and the homilies. He continued his attack in *Not Paul but Jesus* (not published till 1823), in which he sought to prove that St. Paul had distorted the primitive doctrines of Christianity, and subjected the evidence as to the apostle's conversion to a stringent criticism. He maintained also that St. Paul was responsible for the introduction of dogmatic theology, and consequently for the institution of the Catechism. Next he wrote, or furnished the materials for, the *Analysis of Natural Religion*, which was eventually issued by Grote (in 1822) under the pseudonym of "Philip Beauchamp." There is no doubt that Grote's own share in the final composition of the treatise was considerable. These writings are an excellent example of the working of Bentham's mind in its gradual apprehension, investigation, and exposure of abuses and evils, beginning in the restricted sphere of some particular subject, extending the boundaries to allied matters, and ultimately entering on a wide, comprehensive field. Thus falling foul of the Catechism as an educational instrument, he proceeds to evidences of religion, and then considers the utility of religion itself. As he had changed in his political views, so had he changed in his religious opinions. He was brought up in the doctrines of the Church of England, but soon dissociated himself from theoretical creeds, and stood boldly

for universal toleration. Every man, he would say, is master of his own actions; no man is master of his own opinions. Nevertheless he thought that dogmatic religion need not necessarily be antagonistic to the principle of utility, and to the promotion of general happiness; and in his consideration of penal law he suggested that religious services in prisons should be rendered attractive so as to be more efficacious, and that the chaplain might well be a "daily benefactor—a friend to console and to enlighten."

In connection with these educational and religious productions may be mentioned the pamphlet *Swear not at all*,¹ which was printed in 1813 and published in 1817. In it he vigorously assails the administration of the oath as being unnecessary, mischievous, and anti-christian. He had not, of course, forgotten his bitter experience regarding the compulsory acceptance of the Thirty-nine Articles in his matriculation days; and so he enlarges on the immoral practice of imposing oaths in "the two Church of England universities, more especially in the university of Oxford." The promissory oath, he held, not infrequently prevented a man from following the dictates of his conscience; and sometimes it was regarded as an excuse for the commission of an offence. The assertory or judicial oath was less objectionable; but it ought not to involve a sacred invocation, which tends to obscure the real evil resulting from the falsehood. The criminal character of lying should not be made to depend on the alleged profanation of a ceremony, importing a religious sanction; rather it should depend on the mischievous consequences flowing from the intrinsic evil of the act itself.

In 1818 Bentham left Ford Abbey, and returned to the "Hermitage" in Queen's Square Place.

Now he devotes his energies more than ever to the task of formulating legislative schemes, parliamentary bills, and resolutions, and assumes to himself, so to speak, the duties of draftsman-, codifier-, and legislator-in-chief to the world in general. Indeed in 1822 he actually issued an extraordinary *Codification Proposal*,² in which he offered to codify for any state needing a legislator of liberal views, and added, in good earnest, testimonials to his competence for such work. In the task of diffusing the tenets of philosophic radicalism in England, he received valuable support, both in the House of Commons and outside, from men like

¹ *Works*, vol. v, pp. 182-229.

² Vol. iv, pp. 535-594.

James Mill, the historian, economist, and philosopher; Major Cartwright, the "father of reform," and a veritable warrior in the pamphleteering world; Sir Francis Burdett, one of the most popular politicians of his time, and a fearless advocate of liberty and reform. Further, the spread of Benthamite views was materially assisted by such men as Romilly, Brougham, and O'Connell at home, Dumont on the Continent, Edward Livingston in the United States, and other distinguished men animated by a desire for reform, if not for extreme radical measures. At the instance of Burdett, Bentham drew up a series of concise resolutions on the subject of universal suffrage, annual parliaments, and vote by ballot, and the former undertook to move the resolutions in the House of Commons. "My tongue shall speak," observed he like a faithful disciple, "as you do prompt mine ear. . . . My first reward will be the hope of doing everlasting good to my country; my next, and only inferior to it, that of having my name linked in immortality with that of Jeremy Bentham; and though, to be sure, it is but as a tomtit mounted on an eagle's wing, the thought delights me. Bentham and Burdett! the alliteration charms my ear."¹ On June 2, 1818, the resolutions were moved; but they received no support either from the Whigs or from the Tories, and they were therefore thrust aside by a peremptory motion for the order of the day.

Bentham corresponded with some of the leading men of his time on the subject of codification, and endeavoured with much ingenuity to enlist their sympathy or their services for his various schemes. And all this labour he took upon himself regardless of gain or recompense. When Lord Sidmouth became Home Secretary in 1812, Bentham had an interview with him, in the hope that his services might be accepted for the preparation of a penal code.² Lord Sidmouth held the office for nine years and, as we shall see in connection with Romilly's efforts in the House of Commons, made himself unpopular by his unwarrantably coercive measures. The utilitarian reformer saw he had little to hope from hardened Tories like Sidmouth, and enemies of reform and religious liberty like Eldon, the Lord Chancellor. The latter's methods and the abuses arising therefrom, Bentham exposed in an incisive and daring pamphlet, which will be presently referred to. Then he tried to obtain the services of the Duke of Wellington; in long letters he begged him to transcend the fame

¹ *Works*, vol. x, p. 494.

² *Ibid.*, p. 468.

of Cromwell by making an onslaught on the obnoxious devotees of antiquated law and out-of-date administration. The duke replied in his own hand, and good-humouredly accepted a reproof from the vigilant critic in regard to the duel with Lord Winchilsea.¹ Bentham also communicated with O'Connell who, in speaking of legal abuses in 1828, described himself "an humble disciple of the immortal Bentham."² Soon closer relations were established between them, and we find Bentham addressing "the liberator" in his letters as "Dan, dear child." With Brougham, as with Romilly, Bentham was on intimate terms, and with both of them he came to be disappointed—in the case of Romilly, at all events, with little reason. Romilly's views were not in complete harmony with those of the utilitarian philosopher, and his temperament was not sufficiently flexible and amenable to satisfy the demands of the arch-reformer. Brougham visited Bentham in 1812, and was looked upon as a disciple who would soon eclipse the parliamentary brilliance of Romilly. Frequent communications afterwards took place between them. In 1827, when Bentham heard that Brougham was about to introduce proposals for law reform in the House of Commons, he offered his disciple views on evidence, the judiciary, and codification, in the form of "some nice little sweet pap of my own making," for which Brougham thanked his "dear grandpapa," informing him that he was "already fat on it." Then Bentham offered further supplies to his "dear, sweet little poppet."³ But when the orator—the cherished fosterling of the utilitarian parent—had soon afterwards made his speech, Bentham said that the mountain had been delivered of a mouse. He concluded that Brougham was "not the man to set up" simple and rational principles, and that whilst pretending to be an opponent of Peel, he was really his accomplice.⁴ In 1830 Bentham was obliged to hold up to his erring proselyte this same "Master Peel" as a "model good boy," and to tell him that he needed a dose of "jalap" instead of "pap," as he could not even spell properly "the greatest happiness principle."⁵ In September 1831 Brougham (who had become Lord Chancellor the year before) announced a scheme for effecting some improvements in the courts. But this did not satisfy Bentham who, in his last pamphlet *Lord Brougham displayed*,⁶ deplored that his disciple had

¹ *Works*, vol. xi, pp. 13, 28.

⁴ *Ibid.*, p. 588.

² Vol. x, p. 594.

⁵ Vol. xi, p. 37.

³ *Ibid.*, p. 576.

⁶ Vol. v, p. 549.

"stretched out the right hand of fellowship to jobbers of all sorts,"¹ and had adopted only such principles as served his own vanity.

Bentham's relationships with the United States are also noteworthy. In 1811 he offered his services to James Madison, then president, to construct a "Pannomion," or complete code, for the use of the United States. In 1817 he repeated the offer to Madison, and made a similar proposal to the Governor of Pennsylvania. With John Quincy Adams, who was then American ambassador in England, he had many conversations on the subject. In Louisiana, Edward Livingston, an avowed disciple of the new utilitarianism, systematised the civil code (1823-4), and afterwards completed his penal code; for which he acknowledged his indebtedness to Bentham. In 1830, in a presidential message of General Jackson the work of the eminent English reformer was referred to.

On the Continent, too, Benthamite conceptions spread, and nations sought his advice, which he was always ready to give. In 1809 the Emperor of Russia employed Dumont in some work of codification, and in 1817 Geneva engaged him for the same purpose. Dumont could not fail to import into his code of penal law and prison regulations a whole body of his master's doctrines.² In 1820 and 1821 Bentham was consulted by the constitutional party in Spain and Portugal, and he at once produced elaborate tracts for their enlightenment. In 1822-3 he pointed out to the Government of Tripoli the way in which they should go. In 1823 and 1824 he was a member of the Greek committee, and corresponded with Mavrocordato and other leaders.

In April 1824 appeared the *Westminster Review*, which Bentham established (at his own expense) as a radical organ, in order to make head against the *Edinburgh* (the review of the whigs), and the *Quarterly* (that of the tories). Among the early contributors were James Mill, J. S. Mill, Austin, Grote, Bowring, Bingham, Fonblanque, Roebuck, Graham, and E. Tooke.

His correspondence with distinguished people, and his appeals and offers to nations regarding his favourite subject, codification, were supplemented by his publications thereon. After the appearance of his *Codification Proposal* came the *Leading principles of a constitutional code for any state*³ (1823). In 1827 was printed the first volume of his *Constitutional Code*, and another volume

¹ *Ibid.*, p. 609.

² Cf. vol. iv, pp. 451-594.

³ Vol. ii, pp. 267-274.

in 1830. The gigantic work occupied his attention till almost the day before his death. It was not published in its entirety till 1841.¹ This production, which exercised a great influence in many countries, has been considered the most comprehensive and the most mature of his writings. Unfortunately the ponderous style and the overwhelming mass of not very interesting details almost obscure the luminous suggestions lavishly scattered.

This unpleasing, diffuse, complicated style is confined almost entirely to his later works. His earlier writings, say, those composed before the first decade of the nineteenth century was over, are, on the contrary, marked by a simplicity, vivacity, terseness, and directness of style that would not have put to shame the best prose masters of the eighteenth century. Apparently determined—whether unconsciously or deliberately it is difficult to say—to be original in manner as well as in matter, and persuaded that the form and tone of his propagandist work, his analytic criticisms, and his schemes of legislative reform should be scientific rather than “literary,” he invented terms and expressions, simple and compound—a good many of them infelicitous, even unsightly, which would terrify a skilled etymologist—he spun out innumerable parentheses, made wearisome reiterations, and drew out his sentences to a breathless length. But occasionally, however, we also find sudden flashes of his earlier brilliance; which remind us that the hand still possessed something of its former cunning, if only it were not compelled to be the slave of a wayward mind. A didactic treatise, he thought, should sacrifice every other stylistic virtue to the essentials of exactness and completeness; and to attain this end he endeavoured to force the various qualifying clauses within the limits of the particular sentence to which they related. He was fond of what he called the “substantive-preferring principle”;² so that he would employ the abstract form, “I give extension to an object,” rather than the concrete “I extend an object.” Where a substantive is used, he thought, the idea is “stationed upon a rock”; if only a verb, the idea is “like a leaf floating on a stream,”—for a verb “slips through your fingers like an eel.”³ Amongst his numerous neologisms, there are some, however, that have taken a permanent place in the language, and are certainly indispensable acquisitions, e.g. “codify,” “minimise,” “international,” and several others. As for the less desirable attributes of his later manner of expres-

¹ *Works*, vol. ix.

² Vol. iii, p. 267.

³ Vol. x, p. 569.

sion, it is curious that he who had so unsparingly ridiculed the laboured technical style—the “surplusage,” the “involvedness,” the “lengthiness”—of lawyers and legislators (who, presumably, maintained it in their tacit conspiracy for purposes of corruption), had eventually fallen himself into a style just as laboured and just as unbeautiful. He realised that his diction was different from that of other writers, and no doubt was proud of it, and as impatient of aspersions cast on it as he was when his views were questioned. When Francis Place, the radical reformer, who was a disciple and a great admirer of Bentham, once wrote to James Mill of his master’s difficult phraseology, Mill replied: “There is no one thing upon which he plumes himself so much as his style, and he would not alter it if all the world were to preach to him till Domesday.”¹

To conclude now the catalogue of his writings and the brief chronicle of his life. In 1824 appeared *Indications respecting Lord Eldon*,² which had been written earlier. The author insisted on publishing it, despite the anxious warning of friends who were certain that prosecution would follow. The tract is a vigorous, pungent, unsparing attack on the Lord Chancellor’s methods of delaying suits, and on the gross abuses prevailing in the Chancery and King’s Bench offices, such as the exaction of fees for services never rendered, the creation of sinecures, the frequent absence of higher officials receiving large salaries. (The fortune of over half a million left by Eldon at his death in 1818 shows that he knew how to look after his own interests.)

In 1825 he went to Paris to consult a physician as to the treatment of a skin affection from which he was then suffering. He then met again his old friend Lafayette, and was much gratified at the hearty welcome accorded to him in the French capital. It is related that on one occasion as he entered the courts of justice, the whole bar rose to receive him, and the President insisted that the celebrated English “jurisconsulte” should take the seat of honour at his right hand.³

In 1829 he produced his *Justice and Codification Petitions*,⁴ and in the following year published a series of letters on the sale of public offices, a practice which he thought would probably turn out an advantage; though the reasons advanced by him are hardly convincing. At this time he gave his attention to

¹ G. Wallas, *Life of Francis Place* (London, 1898), p. 85.

² *Works*, vol. v, pp. 348–382.

³ Vol. x, p. 551.

⁴ Vol. v, pp. 437–548.

international law, which he intended to codify systematically; but he left no finished work on the subject. In 1831 he was considering the art of framing laws, and his speculations thereon are contained in his *Pannomical Fragments*.¹

In 1830, on the outbreak of the revolution in France, Bentham administered some good advice to the state that had made him a citizen nearly forty years before. And to the very last he maintained his interest in the political and legislative developments in France, and his relationships with some of the leading figures in that country. In 1832—at the age of eighty-four, and in the year of his death—he entertained Talleyrand, with whom he had discussed his Panopticon scheme some forty years earlier.

He was even more fully alive to the political excitements at home, notwithstanding his advanced age. In 1831 he was busy with the formation of a Parliamentary Candidate Society; and his recommendations of candidates for election indicate more his extreme cosmopolitanism than his electoral wisdom. Not long before the death of Romilly in 1818, Bentham had suddenly become dissatisfied with his friend's views and political activity, and actually wrote in favour of an opponent obviously far inferior in capacity and worth. And now, when he was old enough to know better, he was especially desirous of securing the nomination not only of Rammohun (Ram Mohan) Roy, the Hindoo religious reformer, but also of a half-caste and a negro. Of course, anyone he sought to return to the House of Commons he was prepared—with perfect consistency—to welcome in his own house. "I should like," he declared, "to invite a Yankee and a negro, a lord and a beggar to my table." Anybody whatever would apparently be more acceptable in his eyes than those dreadful objects of his rancour and contempt, "the hirelings of the law—purchasable male prostitutes," who became worse (he said) the higher they rose, and were surely beyond redemption!

On June 6, 1832—shortly before the passing of the great measure which signalises the advent of Benthamism in full force—Bentham died at Queen's Square Place. In his will he directed his body to be dissected, in the presence of his friends, for the benefit of mankind. An incision was formally made; and clothed in his customary attire, his skeleton, supporting a waxen effigy of his head, was placed in the anatomical museum, University College, London.

¹ *Works*, vol. iii, pp. 211-230.

"It is indispensable," writes John Stuart Mill, who was perhaps the most eminent of Bentham's disciples and was, indeed, a profounder thinker than his master in the field of utilitarian philosophy, "it is indispensable to a correct estimate of any of Bentham's dealings with the world, to bear in mind that in everything except abstract speculation he was to the last . . . essentially a boy. He had the freshness, the simplicity, the confidingness, the liveliness and activity, all the delightful qualities of boyhood, and the weaknesses which are the reverse side of those qualities—the undue importance attached to trifles, the habitual mis-measurement of the practical bearing and value of things, the readiness to be either delighted or offended on inadequate cause. These were the real sources of what was unreasonable in some of his attacks on individuals . . . ; they were no more the effect of envy or malice, or any really unamiable quality, than the freaks of a pettish child, and are scarcely a fitter subject of censure or criticism."¹ All through his life, we may truly say, Bentham remained in many respects a child,—in his vivacity, in his naïveté, in his gusto, in—occasionally—over-emphasis of trifles, exaggeration of details, and quixotic notions, in his ignorance of human nature, in his love of animals, in his cock-sureness, his vanity, and love of praise. He enjoyed unfailing good health, and experienced no great grief. He lived on simple fare—bread, tea, fruit, etc., supplemented by home-brewed ale. Of a morning a canister of hot spiced ginger-nuts and a cup of strong coffee were served on his study table,—not very extravagant luxuries even for a literary hermit. He was attached to pets; he had a succession of cats, and cherished the memory of a "beautiful pig" at Hendon, and of a donkey at Ford Abbey. He encouraged mice to play in his study—"a taste which involved some trouble with his cats, and suggests problems as to the greatest happiness of the greatest number."² He declared that he loved everything that had four legs. He was fond of his garden, took a pride in his flowers, and tried to introduce useful plants. He delighted in music, especially the works of Handel, and had an organ in his house. Hazlitt remarks³ that "Mr. Bentham relieves his mind sometimes after the fatigue of study by playing a fine old organ, and has a relish for Hogarth's prints." He seems to have disliked poetry, which he stigmatised as

¹ *Dissertations and Discussions* (London, 1867), vol. i, p. 392, note.

² Stephen, *op. cit.*, vol. i, p. 231.

³ *Spirit of the Age*.

"misrepresentation." What was the difference between prose and poetry he soon settled. "Prose," he remarks, "is when all the lines except the last go on to the margin. Poetry is when some of them fall short of it."¹ He thought that doggerel, however, might prove useful for the purpose of "lodging facts more effectually in the mind." He read few books, paid no attention to the published criticisms on his writings, but kept regularly in touch with the news of the day. He worked with machine-like regularity, for the most part in the mornings, writing out from ten to fifteen folio pages a day, under the different headings into which he had previously divided the subject in hand. In this labour of actual composition—evolution of ideas from his inner consciousness and not based on the works of other writers—he delighted; but once the more or less scattered fragments were produced, his literary vanity—in marked contrast to his philosophical vanity—was so small, that he freely allowed his friends and disciples to put them into systematic form. He cared comparatively little for the finished product, after he had set forth the vital essence of a subject—fundamental conceptions, suggestions, schemes for reconstruction. As a rule he was "not at home" to callers, even distinguished ones. But to a small circle of friends he gave pleasant dinners, attended to their comfort, and freely discussed with them his favourite topics, on which he had frequently prepared notes beforehand. He could be irritable—as becomes a philosopher—when his cherished whims were crossed. Francis Place, who stayed several weeks with him at Ford Abbey in 1817, described him as "the most affable man in existence, perfectly good-humoured, bearing and forbearing, deeply read, deeply learned, eminently a reasoner, yet simple as a child; annoyed sometimes by trifles, but never by anything but trifles never worth a contentious observation." ■

An interesting picture of Bentham and his home is given by Richard Rush, American minister in London, in his account of a visit to Queen's Square Place in 1818, when his host was seventy years of age. "If Mr. Bentham's character is peculiar, so is his place of residence. It was a kind of blind-alley, the end of which widened into a small neat courtyard. There by itself stands Mr. Bentham's house. Shrubbery graced its area, and flowers its

¹ *Works*, vol. x, p. 442.

² G. Wallas, *Life of Francis Place*, p. 81. Cf. Romilly's reference to his visit about the same time, *Memoirs*, vol. iii, pp. 315-317.

window-sills. It was like an oasis in the desert. Its name is the Hermitage. Mr. Bentham received me with the simplicity of a philosopher. I should have taken him for seventy or upwards. Everything inside the house was orderly. The furniture seemed to have been unmoved since the days of his fathers, for I learned that it was a patrimony. A parlour, library, and dining-room made up the suite of his apartments. In each was a piano, the eccentric master of the whole being fond of music as the recreation of his literary hours. It is a unique, romantic-like homestead. Walking with him into the garden, I found it dark with the shade of ancient trees. They formed a barrier against all intrusion. The company was small but choice. Mr. Brougham; Sir Samuel Romilly; Mr. Mill, author of the well-known work on India; M. Dumont, the learned Genevan, once the associate of Mirabeau, were all who sat down to table. Mr. Bentham did not talk much. He had a benevolence of manner suited to the philanthropy of his mind. He seemed to be thinking only of the convenience and pleasure of his guests, not as a rule of artificial breeding as from Chesterfield or Madame Genlis, but from innate feeling. Bold as are his opinions in his works, here he was wholly unobtrusive of theories that might not have commanded the assent of all present. When he did converse, it was in simple language, a contrast to his later writings. . . ."¹ His features in old age "bespoke serenity, benevolence, and conscious power."² One who met him in 1818 said that "it was impossible to conceive a physiognomy more strongly marked with ingenuousness and philanthropy."³ The appearance of the octogenarian philosopher and reformer, ever hale and hearty, is thus sketched in a notice that appeared soon after his death: "His apparel hung loosely about him, and consisted chiefly of a grey coat, light breeches, and white woollen stockings, hanging loosely about his legs; whilst his venerable locks, which floated over the collar and down his back, were surmounted by a straw hat of most grotesque and indescribable shape, communicating to his appearance a strong contrast to the quietude and sobriety of his general aspect. He wended round the walks of his garden at a pace somewhat faster than a walk, but not so quick as a trot."⁴ He was fond of taking the air in his garden; he

¹ Richard Rush, *Residence at the Court of London* (London, 1872), pp. 286-291.

² Sir John Macdonell, in *Dict. Nat. Biog.*, s.v. *Bentham*.

³ J. Parton, *The Life and Times of Aaron Burr* (New York, 1861), p. 521.

⁴ *Annual Biography and Obituary* (1833), p. 363.

regularly indulged in what he characteristically termed his "ante-jentacular" and "post-prandial" perambulations, and "ante-prandial circumgyrations."

Apart from his disappointed attachment to Miss Caroline Fox, it appears that no other woman—beyond his cook or housemaid—ever entered his life. His literary labours, exempt from the disturbances of love and the misunderstandings and difficulties that sometimes arise in conjugal life, no doubt profited thereby in certain respects; but had he had these experiences, had he mixed more with the world, he would certainly have become more acquainted with real everyday human nature—its caprices, its vicissitudes, its varying ideals, its inconsistent strivings—and would have avoided a good deal of his somewhat mechanical psychology, to the great advantage of his speculations. To show men the way in which they should go, to set up laws for them requires an intimate knowledge, which is obtainable only by personal and frequent contact with them. For the achievement of unimpeachable results it is not enough to conjure up a phantasmal "average" man from the fastness of one's hermitage, and then to seek to minister to his imaginary needs and contrive a remedy for his presumed maladies. Bentham's self-detachment begot in him—naturally of a sanguine disposition—an over-confidence in himself, in all his ideas and projects, and a corresponding depreciation of, even contempt for, the views and productions of others. Even a man like Burke he thought shallow and insincere. The world had not yet indeed produced intellects worthy of his whole-hearted admiration and esteem. His settled conviction of his pre-eminence accompanied him even in his sleep. "When I am in good health," he once said, "I dream that I am a master among disciples." He sincerely believed that the world, burdened with inefficient laws and institutions, needed his legislative guidance in the work of fundamental reconstruction. He put himself forward, then, as a veritable "preux chevalier" in the arduous field of legislation; he was—like a doughty champion deeply solicitous for the welfare of his fellow-creatures—ready to rescue nations in distress, and to legislate for anybody, anywhere, and at any time. How very strange that one who was such a keen wit and true humorist should be lacking in the sense of the ludicrous—that last touchstone of self-criticism! The nature of Bentham presents an extraordinary mixture of antithetical characteristics—his attachment to reason and scientific method

added to a predisposition to dogmatism; whilst dealing in concrete facts, he yet remains often unpractical; absence of fear, even unrestrained audacity in his writings opposed to reserve verging on bashfulness in his personal relationships with others; exceeding vanity in respect of his intellectual productions coupled with a singular indifference to the retouching and reorganising of his manuscripts by other hands; ever impatient of obscurity and technicality, yet himself perplexing and alarming his readers by his manner of expression; full of genuine benevolence and philanthropy, yet lacking in passion and imagination. But the totality of his foibles is easily outweighed by the great virtues of his heart and the unique excellences of his mind. The totality of his mistakes does not prevent him from occupying the very first place as a reformer of law and administration. He had that in him which could call forth the unqualified encomium of one of the acutest observers of men: “. . . My twenty years’ friend, my good master from whom I learned I know not how much, as it spread in so many directions. He was my constant, excellent, venerable preceptor, of whom I think every day of my life, whose death I continually lament, whose memory I revere, and whose absence I deplore.”¹

¹ Francis Place to S. Harrison, May 2, 1834; quoted in G. Wallas, *op. cit.*, p. 92.

CHAPTER II

NATURE OF THE AGE IN WHICH BENTHAM LIVED. HIS RELATIONSHIP THERETO

(i) GENERAL CONDITIONS

WE have already seen, in the preceding essay on Beccaria, what were the characteristics of the eighteenth century in Europe generally. The observations there made may be supplemented by a few remarks on the nature of the age in England. The character of Bentham's thought, work, and achievements, and of the entire reform movement will be then more readily realised.

Bentham was born in the middle of the eighteenth century, at an epoch of transition, which constitutes an important and significant parting of the ways. A new world was being engendered; marked changes in the literary and philosophical movements, in political views, in social conditions, in religious conceptions, in economic doctrines, in class relationships, in men's attitude to life and to their fellow-creatures, were taking place. In France the "siècle de Louis XIV"—the classical epoch of law, order, regularity—is expiring; it is followed by the reactionary period of the Revolution, which was inaugurated in the world of thought and opinion by such heralds of innovation as Montesquieu's monumental *L'Esprit des lois* (1748), and the early writings of Rousseau. The "romantic" age—the age of intellectual, religious, and moral emancipation—is advancing. In England Hume's *Inquiry into the Principles of Morals* (1751), *Political Discourses* (1752) and other striking contributions, together with David Hartley's *Observations on Man* (1749), indicate a new departure in philanthropy, religion, social economy, and political and moral science. The epoch of utilitarianism, of the "industrial revolution," of economists and inventors is commencing. This general transition had already been preparing for half a century, with the earlier impetus given to the new movement by the work of Locke and Newton.¹

¹ Cf. Halévy, *op. cit.*, vol. i, pp. 1, 2.

"The distinctive virtues of the eighteenth century," writes Lecky, "were not those which spring from passionate or definite religious convictions. For these we must look rather to the two centuries that preceded it. In its closing years, it is true, the Methodist and Evangelical movements, and the strong conflicting passions aroused by the French Revolution, somewhat altered its character; but in general it was an unimpassioned and unheroic age, singularly devoid of both religious and political enthusiasm, and much more remarkable for intellectual than for high moral achievements. It was pre-eminently a century of good sense; of sobriety of thought and action; of growing toleration and humanity; of declining superstition; of rapidly extending knowledge; of great hopefulness about the future. In England, we must add to these characteristics a steady national progress; a free and temperate government; a constantly increasing respect for law; a remarkable absence of class warfare, and of great political and religious convulsions."¹

The second half of the century shows a distinct advance, in respect of tone and manners, on the first half. Brutal and violent practices diminish; there is less of rank injustice generally. There is a growing feeling against the ill-treatment of slaves, and indeed against the whole traffic in them. Public opinion is being aroused about the horrible nature of prisons, of public executions, the abuses of the pillory. Legislation is becoming somewhat more rational and practical; attention is beginning to be directed to police organisation and to the condition of the roads; there is a diminution in the offences of highway robbery, piracy, smuggling, and kidnapping; proneness to riots and public disturbances is lessened. The practice of recruiting for the army and navy becomes less irregular and haphazard. Public amusements are losing much of their former grossness. The treatment of subordinates, including servants and children, is becoming more human.² It is true that as the century is drawing to its close, we find complaints of increasing vice in the upper sections of society; but a few examples furnish no proof of general conditions. As Lecky well says: "Each generation has its censors who pronounce it to be altogether extraordinary in its depravity, and these denunciations are sometimes even a sign of progress,

¹ *History of England in the Eighteenth Century*, vol. vi (1887), chap. xxiii, pp. 270, 271.

² *Ibid.*, pp. 267, 268.

for they merely show that men are more conscious of the evils around them; have raised their standard of excellence, and have learned to lay an increased stress upon moral improvement. This was very eminently the case at the close of the last century [i.e. the eighteenth] when the Methodist and Evangelical movements were at their height." ¹

The association of individualism and utilitarianism with the spirit of philanthropy was a significant feature of the time. (In the case of the Continent, we have already seen this in the preceding essay; witness the writings of Beccaria, Rousseau, Voltaire, and the Encyclopædists.) The essential attributes of individualism—independence, energy, self-reliance—were widely emphasised as being the *sine qua non* of political and social salvation. Speaking generally, we may say that the foundations and first principles of politics, law, social science engaged but little the attention of Englishmen; they were concerned more with practical details, isolated abuses and irregularities that had become gross and intolerable. Utilitarianism insists on concrete facts, observation, and the drawing of conclusions in accordance therewith. It adopts thus the empirical method, and so shows itself to be in harmony with the individualistic point of view, which looks to facts and particular interests rather than to comprehensive and coherent theories. Further, utilitarianism had regard not to the exclusive welfare of this or that section of the community, but to the greatest happiness of the greatest number. And so a notable characteristic of the utilitarian movement came to be an increasing spirit of humanity and philanthropy, coupled—and inevitably so—with an ardent desire for reform. To this end various causes contributed, such as, in the first place, the rapid development of the Press, which more and more revealed striking cases of suffering and abuse hitherto for the most part unobserved; secondly, the irrepressible democratic expansion, which was so powerfully aided by the industrial evolution and the growing wealth of the middle classes; and lastly, the Evangelical revival.

During the greater part of the eighteenth century there was really less demand—as compared, say, with the present time—for measures of charity and philanthropy. Industry was less liable to fluctuate. The division of classes was more marked, and the relationship between them remained more clearly defined

¹ *History of England*, vol. vi (1887), chap. xxiii, p. 269.

and more stable. The standard of comfort was lower, extreme want was, comparatively, rarer. The poor law system was most generously—and most unwisely—administered. Measures of legislation were limited to a few spheres. Attempts were made indeed to regulate commercial interests and to prevent crime—in many cases, as we shall see later, with signal ill success. Some provisions were made respecting private madhouses, and the treatment of children employed to sweep chimneys. But little was done, in the way of broad legislative changes, to remedy social abuses in general, and to alleviate the sufferings of the poor. The operation of the law of settlement (dating from the year 1662) had wrought much evil among the labouring classes. It tended actually to engender pauperism. Each parish, in its endeavour to keep down the rates and avoid the burden of maintaining the poor, could prevent the immigration of labourers or even expel them if they were likely to become chargeable. Thus, there was brought about a factitious interference with the free circulation of labour—the only saleable commodity possessed by the poor. Adam Smith denounced the law as a “violation of natural liberty and justice.”¹ He declared that it was frequently a more difficult task for a poor man to cross the artificial boundaries of his parish than to cross a mountain ridge or an arm of the sea; and he believed there was scarcely a poor man over forty in England who had not been at some time or other “cruelly oppressed” by the application of this law. For the rest, the few enactments relating to Sunday observance, gaming, lotteries, disorderly houses were totally inadequate for the regulation of habits and the prevention of private vices.

What legislation failed to do, benevolence and philanthropy attempted to supply. Charity organisations in London represented noteworthy efforts. What with foundling hospitals, Magdalen asylums, societies for training destitute boys as sailors, for aiding persons imprisoned for small debts, and discharged prisoners, it seems that the poor, the abandoned, the unfortunate were not altogether forgotten. Large sums of money were sometimes raised to assist prisoners of war, or soldiers and their families; and foreign appeals were not disregarded. Towards the end of the century, this benevolent spirit was, with the softening of manners, still further promoted, especially by the Evangelicals, who established numerous religious organisations

¹ *Wealth of Nations*, bk. i, chap. x.

and educational societies. Indeed this growing kindliness elicited at times some hostility. Thus Fielding was blamed for palliating the vices injurious to society and corrupting the rising generation; he was reproved for setting the fashion of reducing virtue merely to the exercise of good affections, instead of regarding it as the fulfilment of moral obligations, and of representing "goodness of heart" as a sufficient substitute for probity.¹ Hannah More observes that the time in which she lived was conspicuously an age of benevolence and liberality. But she thinks it was "the fashion rather to consider benevolence as a substitute for Christianity, than as an evidence of it. . . . It seems to be one of the reigning errors among the better sort to reduce all religion into benevolence, and all benevolence into almsgiving."²

The current of humanitarianism, so closely allied to that of Evangelicalism, was gaining in momentum at the end of the eighteenth century and at the beginning of the nineteenth. It contributed greatly to the enactment of a large number of beneficial measures (which will be referred to hereafter), and prepared the way for the decisive triumph of Benthamism. The essence of humanitarianism is a deep-rooted aversion from physical pain or moral suffering, together with the consequent desire to put an end to all manifest forms of cruelty, oppression, injustice. "This passionate humanitarianism," says Professor Dicey, "opposed though it was to much popular indifference as regards various forms of cruelty,³ was shared by philanthropists of every school, with many men whose fear of Jacobinical principles made them shun the name of reformers. In the detestation of cruelty, Benthamite free-thinkers, Whig philanthropists, such as Fox, Tory humanitarians, such as Pitt, and Evangelicals who followed Wilberforce, were substantially at one. On this subject, men divided by the widest political and theological differences stood side by side; there was here no difference between Burke and Bentham, or between Wesley and his biographer Southey. Common humanitarianism was a strong bond of union between men who on other matters were stern opponents; William Smith, a leading Unitarian, or, in the language of the time, Socinian, and

¹ Sir John Hawkins, *Life of Johnson* (London, 1787), pp. 214, 215.

² "An estimate of the religion of the fashionable world" (1790), in *Works*, vol. xi, pp. 87-91.

³ "E.g. sports, such as bull-baiting or prize fights, of which the one was defended by Windham, the friend and disciple of Burke and of Johnson, and the other was patronised on principle by a statesman so kindly and so religious as Lord Althorp."

the representative, in the words of a satirist, of 'all the opinions of all the Dissenters,' was the esteemed friend of the Tories and orthodox Churchmen who made up the Clapham sect. James Mill, whom the religious world of his generation knew to be a free-thinker, and would, had they been aware of his true opinions, have termed an atheist, was the ally, if not the friend, of Zachary Macaulay, an enthusiastic, not to say fanatical, Evangelical."¹ These facts "remind us that in an age disgraced by much general brutality, reformers of every school were united in the crusade against cruelty; . . . that a period of political reaction might also be a time during which humane feeling is constantly on the increase."² Between 1800 and 1830 Benthamism laid the foundations of its future supremacy. Though not yet dominant it exerted towards 1830 marked influence in public life; and the era of Benthamism coincided to a great extent with the Evangelical revival. It was the age of Wilberforce (1759-1833), of Clarkson (1760-1846), of Zachary Macaulay (1768-1838), of Simeon (1759-1836), of Henry Martin (1781-1812), of Elizabeth Fry (1780-1845), of Hannah More (1745-1833)." Many more might be added. They show "that at the beginning of the nineteenth century Evangelicalism was among religious Englishmen supreme, and Evangelicalism, no less than Benthamism, meant as a social creed the advocacy of every form of humanity. The crusade against cruelty owes its success in an almost equal degree to philosophic philanthropy and to religious compassion for suffering. Humanitarianism in alliance with religious enthusiasm was assuredly the force which in 1806 abolished the slave trade, as twenty-eight years later it gave freedom to the slaves."³

Having shown now the kind of humanitarian, philanthropic feeling that was manifested in many parts of England, it will be well to make a few observations on the nature of the prevailing philosophic doctrine and political opinion. Certain elements of the utilitarian philosophy had already been propounded before Bentham's systematic and comprehensive exposition of it. The greatest happiness principle was adopted in the *Principles of Moral and Political Philosophy* (1785) of William Paley, who

¹ "Cowper, the friend and disciple of John Newton, inveighed against the Bastille, that 'house of bondage,' with its horrid 'towers,' its 'dungeons,' and 'cages of despair,' with an indignation which would have become a disciple of Rousseau."

² "The reign of Nero is contemporaneous with the spread of Christianity."

³ *Law and opinion in England during the nineteenth century* (London, 1914), pp. 106-108.

acknowledged his own indebtedness, in this respect, to Abraham Tucker. Joseph Priestley in his *Essay on Government*, published in 1768, had proposed to adopt as the fundamental criterion of solving political problems the good and happiness of the majority of the members of a state. And as early as 1725 we find Hutcheson observing, in his *Enquiry concerning Moral Good and Evil*,¹ that "that action is best which secures the greatest happiness of the greatest number." Both John Gay and Tucker had already avoided, to a large extent, the theological sanction; and in the former's *Dissertation* we also find the list of "sanctions," physical, political, moral or popular, religious, which are usually regarded as a characteristic foundation of the Benthamic utilitarianism. Again, both Gay and Tucker maintained (before Bentham) that happiness is the "sum of pleasures." Further, utilitarianism or philosophic radicalism, which may be defined as "Newtonianism applied to matters of politics and morality,"² is based on the principles of utility and association of ideas. And Hume's philosophy had already taken cognisance of the principle of utility and expounded the associationist view. Hume passed for a sceptic; but his doctrines are less related to scepticism than to naturalism. He is acknowledged by Bentham, as well as by Beccaria (a notable advocate of the greatest happiness principle), as one of their masters. And so we find that the antithesis between the rationalist and naturalist tendencies inherent in associationism is constantly reproduced in the great movement of philosophic radicalism.

As a counterpoise to the growing scepticism, the Scottish philosophy—represented by thinkers like Dugald Stewart, Thomas Brown and others—was more or less accepted in England. It resembled political Whiggism in its insistence on rationalism, and also in its antipathy to the unreserved application of a thoroughgoing logic. There was a reluctance to push investigation too far. The English politician was not enamoured of ultimate principles, which in his view savoured of airy abstractness and metaphysical ingenuity; he preferred to attach himself to the traditional point of view and rough-and-ready rules, and to appeal to catchwords about liberty and toleration. Similarly, the whig philosopher adopted the traditional creed, somewhat purged of certain crude elements, and sheltered his doctrine behind his vague "intuitions and laws of thought." But the

¹ iii, ¶ 8.

² Halévy, *op. cit.*, vol. i, p. 4.

utilitarians, regarding themselves as thorough radicals both in philosophy and politics, "hated compromises, which to them appeared to be simply obstructive." ¹

In affairs of actual government, the aristocracy and the landlords formed the dominant class. England was still in the main an agricultural country. The mass of the people was ignorant and poor, and paid but little attention to political matters; and so long as certain prejudices were not excited, it showed no antagonism to the prevailing squirearchy. Upholders of this régime were more than contented with the vaunted British constitution, and with the political and legal legacy bequeathed by their ancestors. In their eyes, subjects of foreign states were, in comparison with themselves, no more than the slaves of despots. When Lord North opposed Pitt's reform in 1785, he claimed that the constitution was "the work of infinite wisdom . . . the most beautiful fabric that had ever existed since the beginning of time," and he added—what apparently seemed to him an inevitable corollary—that "the bulk and weight" of the House of Commons ought to be in "the hands of the country-gentlemen, the best and most respectable objects of the confidence of the people." ² Thus, from about 1760 to 1830, we get—what has been very aptly described by Professor Dicey—a period of old toryism, or legislative quiescence or stagnation, during which the era of Blackstonian optimism ³ (1760–1790) is afterwards reinforced by the Eldonian toryism or reaction against Jacobinism and revolutionary violence.⁴ Thanks to the Revolution settlement, arbitrary power was, it seemed, decisively eradicated, and individual freedom firmly established; and so with the pacification of feuds and the adjustment of religious differences in the eighteenth century, the Blackstonian epoch was one of national pride and contentment, in comparison with the turbulence and hardships of the past. Blackstone is the eloquent spokesman of those who glorified our constitution and administration, and his exposition was welcomed by tory statesmen. Burke was in favour of constitutionalism, and his mind leaned towards a historic, almost a romantically idealised, conservatism. He believed that we can preserve more of the old institutions by making cautious concessions to progress, than by taking up

¹ Stephen, *English Utilitarians*, vol. i, pp. 167, 168.

² *Parliamentary History*, xxv, 472.

³ Cf. Blackstone, *Commentaries*, bk. iv, *ad fin.*

⁴ Dicey, *op. cit.*, p. 62.

an attitude of obstinate opposition or adopting a reactionary policy; but in 1790, in view of the menacing events in France, his hostility to Jacobinism turned him into a reactionist. Paley, a man of cool and tranquil mind, and not given to rushing to extremes, did not worship historic constitutionalism and the traditional edifice of government. He realised the defects of the social system, and even of the monarchical institution; and rather than suppress the famous illustration of the pigeons, which was aimed at these evils, he threw away his chance of high ecclesiastical preferment. And yet even he was fundamentally a defender of the prevailing condition of affairs as a whole. His *Principles of Moral and Political Philosophy* (1785) was dedicated to the then Bishop of Carlisle, the father of the future Lord Chief Justice Ellenborough. The latter, along with other inveterate opponents of penal reform both in the Lords and in the Commons, had fortified themselves by some of the untenable arguments set forth in Paley's chapter on criminal law, and repeated them *ad nauseam* to the continual discomfiture of proposed measures of amelioration.¹

The reactionary influence of the French Revolution on English legislation has just been mentioned. The cataclysm in France² aroused in England the warmest sympathy as well as the strongest hostility; and these contrary feelings are well represented in the celebrated controversy between Thomas Paine and Burke. At first the revolutionary outburst was received here with applause. Fox exclaimed that the fall of the Bastille was the greatest and best event that had ever happened. Romilly considered the Revolution to be "the most glorious event" that had taken place in the history of the world.³ Many thought it heralded the dawn of a new era of peace, progress, and enlightenment. Priestley, writing in October 1789, said: "There is indeed a glorious prospect for mankind before us. Flanders seems to be quite ripe for a similar revolution; and other countries, I hope, will follow in due time; and when civil tyranny is all at an end, that of the Church will soon be disposed of."⁴ Again: "I do not wonder at the hatred and dread of this spirit

¹ See *infra*, the essay on Romilly, chaps. i and ii.

² Cf. G. P. Gooch, "Europe and the French Revolution," in *Cambridge Modern History* (1904), vol. viii, chap. xxv.

³ See *infra*, Life of Romilly, *sub ann.* 1792.

⁴ J. T. Rutt, *The Life and Correspondence of Joseph Priestley* (1831-2), vol. ii, p. 38.

of revolution in kings and courtiers. Their power is generally usurpation, and I hope the time is approaching when an end will be put to all usurpation in things civil or religious, first in Europe, and then in other countries.”¹ Dr. Price, a tower of strength among the Nonconformists, took up a similar attitude. A certain section of peers sympathised with the reform movement. Lord Stanhope and Lord Lansdowne even manifested leanings towards republicanism.² The Duke of Norfolk, on the occasion of Fox’s birthday, proposed as a toast “the health of our sovereign, the majesty of the people.” In November 1789 the “Revolution Society” met at the London Tavern, under the presidency of Lord Stanhope, and in an address of congratulation to the National Assembly expressed a hope that the “glorious example given in France” might “encourage other nations to assert the inalienable rights of mankind, and thereby introduce a general reformation into the governments of Europe.” It was then that Dr. Price delivered before the Society his celebrated sermon, which provided a text for Burke. Then came Burke’s *Reflections* (1790), which offered a marvellously powerful counterblast. The pre-eminent English political philosopher vigorously and cogently maintained that the adoption of the principles of the French revolutionists would lead to the breaking up of the very foundations of order and society, and presented a logically stringent exposition of the principles of evolution, continuity, solidarity, as underlying rational conservatism. Numerous replies were at once issued; of which the most important were Sir James Mackintosh’s *Vindiciæ Gallicæ* (1791) and Thomas Paine’s *Rights of Man* (1791), the former speaking for the educated middle class, the latter for the masses. Sir James Mackintosh, generally moderate in his writings, even ventured to observe that though “the grievances of England did not at present justify a change by violence . . . they were in a rapid progress to that fatal state,” and he declared that “whatever may be the ultimate fate of the French Revolutionists the friends of freedom must ever consider them as the authors of the greatest attempt that has hitherto been made in the cause of man.” Paine presented an elaborate contrast between English and French theories of government, and insisted on the incomparable superiority of the latter. The governing classes were aroused by the *Reflections*;

¹ *Ibid.*, p. 81.

² Cf. the latter’s letter to Morellet, in Lord Edmond Fitzmaurice, *Life of William, Earl of Shelburne* (1875-6), vol. iii, pp. 488-498.

they were panic-stricken by the *Rights of Man*, with its appeal to natural rights and its onslaught on the English constitution, on monarchy and aristocracy alike. Still greater alarm was caused by the decree of the Convention (Nov. 19, 1792), offering to help any people struggling against its rulers. The outbreak of the war effected a transformation in English opinion. Many supporters of the Revolution recanted, e.g. (to mention only a few representative examples) Arthur Young, Mackintosh, Coleridge, Southey. The Church and the universities had all along been antagonistic to the movement; whereas the Non-conformists, who furnished the grand body of sympathisers, remained, on the whole, in favour of it. The latter included such conspicuous unitarians as Dr. Price, Priestley, and Gilbert Wakefield, and leading baptists like Robert Hall. Bentham in his trenchant independent manner attacked the excesses of the Revolution, as well as the principles enunciated in the Declaration of Rights. All these circumstances help to explain the period of reactionary toryism, lasting for some thirty years (1780-1820).

In the meantime the democratic and radical movement was gathering forces from different quarters. Party government in the eighteenth century had betrayed a marked degeneration in many respects. The great whig families had long enjoyed social and political supremacy. There were struggles between the parties for office; and both opposed electoral and judicial reform. The king shared in and interfered with the party game. Parliamentary machinery became corrupt. Now, as against the landed proprietors, a wealthy commercial and manufacturing community was arising. The economic revolution began. Industrial activity was rapidly being emancipated from the harassing and cramping restrictions that had been imposed on it by earlier legislation. The conviction was gradually gaining ground that government interference with industry was an evil;¹ and the "laissez faire" doctrine was adopted by economists and democrats, though not for the same reasons. They held that with a view to the promotion of liberty government should be confined within the narrowest limits. "All government," declared Price,² "even within a state, becomes tyrannical as far as it is a needless and wanton exercise of power, or is carried further than is absolutely necessary to preserve the peace or to secure

¹ Cf. Lecky, *loc. cit.*

² *Observations on Civil Liberty and the Justice and Policy of the War with America* (1776).

the safety of the state." Godwin¹ observed that there are only two legitimate objects of government, namely, to suppress injustice against individuals within the community, and to defend the country against external invasion. Non-radicals likewise showed more or less hostility to government interference. Such distrust is found in the writings of Tories like Hume and Tucker. Arthur Young² pointed out that the prohibition of the natural course of things and the introduction of restrictive forcible measures in domestic policy are evils. Similarly Burke, whilst not against government coercion in general, for example, in religion, also advocated industrial liberty. He proclaimed³ that the main defect of the French monarchy had been "a restless desire of governing too much. The hand of authority was seen in everything and in every place. . . . My opinion is against an overdoing of any sort of administration, and more especially against this most momentous of all meddling on the part of authority, the meddling with the subsistence of the people." Finally came Adam Smith, whose influence in this direction was supreme.

Further, there was a remarkable revival of spiritual and political life among the middle and the lower classes. The disastrous policy of George III with respect to the American colonies was one of the immediate causes of political agitation at home. The Wilkist movement (1768-9) helped to advance radical ideas. Societies and clubs were established. Meetings were held. Pamphlets were distributed. Local authorities forwarded petitions and remonstrances. The shams of party government and the "King's friends" were exposed. The "Friends of the People" in 1793 pointed out that 154 persons actually returned 307 members of parliament, who formed a majority in the House of Commons. As time went on radical ideas were more persistently circulated by the vigorous publications of a number of writers and pamphleteers like Priestley and Price, Major Cartwright and Jebb, Sir William Jones and Granville Sharp, Wynne and Burgh, and were also spread by the speeches of men like Horne Tooke and Sawbridge. The more advanced ideas of thinkers like Godwin and Spence, Aikin and Paine, Wakefield, Fuseli, and Mary Wollstonecraft also gained ground in some quarters. The acquittal of Horne Tooke, Hardy, Holcroft and others in their trial for high treason was a great blow to the government

¹ *Enquiry concerning Political Justice* (1793).

² *Political Arithmetic* (1774-9).

³ *Thoughts and Details on Scarcity* (1795), *ad fin.*

and to toryism. Some of the leading English and French thinkers and reformers met and exchanged views; thus Priestley, Bentham and Romilly had frequent intercourse with Dumont, Morellet, Mirabeau and others. Republicanism also found its avowed adherents in this country. Bentham, aided by able disciples, including both writers and parliamentarians, subjected the whole of English law and government to the most searching examination that had ever been witnessed. In all this multiform conflict between the traditionally constituted powers and the landed aristocracy on the one side and the supporters of popular self-government on the other, the latter eventually triumphed with the passing of the Reform Act of 1832. And this was followed by a remarkable period of Benthamic legislation.

(ii) CRIME AND CRIMINAL LAW

In the previous essay the nature of the continental criminal law and administration in the eighteenth century has been explained and their main defects and abuses have been pointed out. In our own country—with the notable exceptions as to the use of torture and the inquisitorial procedure—conditions were in many respects very much similar.

Owing to the absence of reliable statistics, it is difficult to estimate exactly the amount and fluctuations of crime in England at this time. On the whole it would appear that violent crimes against the person, and especially murder, were diminishing, but that many kinds of offences against property were increasing. During the distress prevailing in the years 1767 to 1771, in particular, there was an extraordinary outbreak of crime. The stringent Game Laws, keeping pace with the extension of enclosures, were responsible for a great number of prosecutions. With the exception of a few specified cases, no one was entitled to shoot or fish even on his own grounds, unless he possessed a freehold estate of at least £100, or a leasehold of at least £150. The sale of game was forbidden; and the punishment for poaching, as may be guessed, was very severe. With the industrial changes, and the rapidly growing price of food towards the end of the century, crimes against property became more frequent. Through the obviously inadequate police administration, large numbers of delinquents escaped detection; and the extreme severity of the law gained immunity for other offenders, some-

times by a perverse acquittal on the part of a jury recognising the disproportion between the punishment and the offence, at other times by the unwillingness of injured parties to prosecute and of witnesses to give testimony. What with the deplorable conditions of prisons and public-houses, the criminal section of the community was being rapidly augmented. The roads were insufficiently protected, and wayfarers were at the mercy of highwaymen and footpads, who by no means confined their operations to the countryside, but even found themselves at liberty to enter towns—London, of course, in particular—and ply their trade in public places. Even such comparatively busy quarters as Kensington Gardens, St. James's Square, Grosvenor Square, Berkeley Square were not free from them. (Of course there was a greater chance of gaining substantial booty in these places.) Solitary travellers rarely ventured after nightfall on Blackheath or Hounslow Heath, on Finchley Common or Clapham Common. Pleasure-seekers or businessmen from London returned to their houses in organised groups.¹ The English highwaymen were not given to the ferocity and savagery of the continental brigand; they were frequently broken tradesmen, and sometimes ruined young men of position, who, in many cases, went back to their former life, if they managed for a time to escape detection.

As regards London, one of the best available sources of information respecting criminal activity at the end of the eighteenth century is the valuable work of Patrick Colquhoun, *Treatise on the Police of the Metropolis*, published in 1795, and of which there was a sixth edition only five years later. The author was appointed a metropolitan police magistrate in 1792, and was associated with several schemes of social reform. His figures and statements do not perhaps always command a reader's acquiescence; but the work is none the less an indispensable one. He says London was three miles broad, and twenty-five miles in circumference; that it contained a population in 1801 of 641,000, occupying a chaotic collection of dwellings; and that there were some 20,000 people who got up every morning without knowing how they would get through the day. There were 5,000 public-houses, and 50,000 women supported, wholly or partly, by prostitution. He calculated that the criminals made an annual income of £2,000,000 as a result of their nefarious

¹ Cf. A. Andrews, *The Eighteenth Century* (London, 1856), pp. 228–246.

practices. The highwaymen constituted a permanent terror to all. There were organised gangs of professional thieves; some were on the river and boarded ships at night, others prowled around the workhouses. They regularly plundered the government dockyards; and frequently the same article was sold several times over to the officials. Half the hackney coachmen were in league with thieves. In the space of twenty years the number of receiving-houses of stolen goods had grown from 300 to 3,000. Coining employed several thousand persons. Gambling increased to an enormous extent. The management of the metropolitan police force was in the hands of a miscellaneous number of authorities—the stipendiary magistrates, the city officials, the justices of the peace for Middlesex, and the seventy independent parishes. There were about a thousand constables, who were artisans or small tradesmen appointed by the parishes for a year without remuneration. A “Tyburn ticket” given as a reward to those who obtained the conviction of a criminal exempted them from the discharge of such duties, and could be purchased for a sum varying from fifteen to twenty-five pounds. There were also some two thousand watchmen, receiving from 8½d. to 2s. a night. “These were the true successors of Dogberry,” as Stephen observes;¹ and not infrequently the aged or the feeble were appointed in order to keep them out of the workhouse.

The penal code presented a mass of incongruities, absurdities, contradictions, and barbarities. As Colquhoun says,² quoting Bacon, the law was a “heterogeneous mass concocted too often on the spur of the moment.” There had been a capricious, unsystematic accumulation of statutes aimed at the same crimes for which earlier provisions were allowed to remain unrepealed. Different penalties existed for the same offences. (Different forms of indictments were necessary for crimes which were similar fundamentally, but varied in certain minor particulars.) Thus in the case of receiving stolen goods, several laws were applicable; but one referred exclusively to pewter-pots, another was confined to precious metals; and neither could be used as against receivers of horses or banknotes.³ Similarly a prisoner indicted under a statute directed against stealing from ships on navigable rivers, enjoyed immunity, if the barge whereon he committed the theft happened at the time to be aground. Thus it was indispensable

¹ *Op. cit.*, p. 103.

² *Treatise on the Police of the Metropolis* (1800) p. 7.

³ Cf. *ibid.*, p. 298.

to set out with the utmost exactitude and in the proper terminology the particular circumstances of the offence alleged, in order to determine precisely its legal character. For example, to say "killed" instead of "murdered" ("murdravit") the deceased, to omit or mis-state the prisoner's surname, or any of his Christian names, to prove facts different from those specified in the charge, although they might actually amount to the legal offence—to say, for instance, that the blow was given with the right hand when it was really given with the left—all these and other such minor matters involved what was termed a "variance," which therefore vitiated the whole prosecution. And, what is more, the objection could be raised at any stage of the proceedings, even after the verdict had been brought in by the jury. But generally the accused was not permitted to see a copy of the indictment before the trial, so that he could hardly have recourse to any loopholes "until the maximum of sport and fees had been extracted from the case."¹ Whilst a quick-witted prisoner might thus avail himself of errors of omission or of commission to frustrate his prosecutor, accused persons, on the other hand, unjustifiably suffered various disadvantages. If they were charged with any of the numerous capital offences, with the exception of treason, they were debarred from the services of counsel, unless some question of law arose which it was necessary to argue. Even Blackstone, who was not inclined to look on the existing criminal law with a critical eye, held there was no valid reason for withholding from a poor ignorant prisoner, whose life was at stake, the same legal assistance that was conceded in cases of petty trespass.² In course of time, however, this rule came to be slightly relaxed; so that the presiding judges in trials for felony might allow counsel to stand near the prisoner, instruct him what questions to ask, cross-examine the witness, but not address the court save on a legal point.³ The witnesses for the defence (unlike those for the prosecution) could not be compelled to attend the trial and give evidence, if they refused to do so for any reason. Some of the rules of evidence were antiquated and oppressive. Owing to the stringent requirements regarding the administration of the oath, the evidence of Quakers and infidels could not be received at all. "Thus it was equally safe to rob an atheist or

¹ Sir R. K. Wilson, *History of Modern English Law* (London, 1875), p. 112.

² Cf. *Commentaries*, bk. iv, chap. xxvii.

³ *Ibid.* Cf. Sir James F. Stephen, *History of the Criminal Law* (London, 1883), vol. i, p. 424.

a Quaker when no one else was present, or to murder a Christian in the presence of an atheist or a Quaker.”¹ Further, in contradistinction to the unduly protracted civil suits (notably those in Chancery), which proved so lucrative to judges, officials, barristers, attorneys, and the Exchequer, criminal trials were hurried through, usually in a single day; in the former, worldly possessions were at stake and fees could be extracted, in the latter only a human life was concerned. “And wretches hang that jurymen may dine,” said the poet with much literal truth.²

There was no consistency, no harmony, no method whatever in the legislation. The law was in theory one thing, and in practice it was often another. The infliction of punishments was to a large extent left to the arbitrary and capricious discretion of the judge, and was not definitely determined by the law; so that from circuit to circuit practices varied to an extraordinary degree, sometimes being marked by ferocious violence, at other times by unpardonable weakness. The punishments threatened by the law could not be more rigorous. The spasmodic prescription of measures of extreme severity and ferocity was evidently thought to be an effective panacea for the preventing or curing of the country’s criminal ills. Many laws were laid down whose violation was actually disregarded. The somewhat indiscriminate classification of crimes into felonies and misdemeanours, the outworn technical rules respecting “benefit of clergy” were fertile sources of abuse, evasion, and injustice. Innocent persons were liable to become the victims of an irrationally applied law; and the guilty could cherish a hope of impunity—and very frequently were their hopes fulfilled. The existence of a multiplicity of laws, and in many cases their inoperative character in practice, through the connivance of authorities at their breach, were facts mentioned by eulogists and apologists alike as evidence of the mild nature of British government. The prevailing confusion of thought, especially so in pre-Benthamite times, must have been great indeed, when conditions that amount to a veritable stultification of the whole criminal jurisprudence were actually proclaimed as a great benefit to the community. Oliver Goldsmith’s observations in the *Citizen of the World*, published in 1760, that is some five years before the appearance of Blackstone’s first volume of the *Commentaries*,

¹ Wilson, *op. cit.*, p. 101.

² Cf. Stephen, *History of the Criminal Law*, vol. i, p. 422.

may well be regarded as representing the views of the average intelligent minds of the time. "There is scarcely an Englishman," the cosmopolitan Chinaman is made to declare, "who does not, almost every day of his life, offend with impunity against some express law, and for which, in a certain conjuncture of circumstances, he would receive punishment. Gaming-houses, preaching at prohibited places, assembled crowds, nocturnal amusements, public shows, and a hundred other instances, are forbid,—and frequented. These prohibitions are useful; though it be prudent in their magistrates, and happy for their people, that they are not enforced, and none but the venal and mercenary attempt to enforce them. The law in this case, like an indulgent parent, still keeps the rod, though the child is seldom corrected. Were those pardoned offences to rise into enormity, were they likely to obstruct the happiness of society, or endanger the state, it is then that justice would resume her terrors, and punish those faults she had so often overlooked with indulgence. It is to this ductility of the laws that an Englishman owes the freedom he enjoys, superior to others in a more popular government."¹ (We shall see later² that Paley's argument involved a similar fallacy.) A foreign observer, possessing a much keener eye and clearer understanding than either Goldsmith's or Paley's, thus comments on the severe laws in England for minor offences, and on their non-execution: "Cette loi n'est pas exécutée. L'usage est ou d'éluder la loi, ou de s'adresser au roi, pour qu'il change la peine. Presque partout les mœurs sont plus douces que les lois qui ont été faites dans les temps où les mœurs étaient féroces. Il est singulier que l'Angleterre, où les premiers de la nation sont si éclairés, laisse subsister une si grande quantité de lois absurdes. Elles ne sont pas exécutées, il est vrai; mais elles forcent la nation à laisser à la puissance exécutrice le droit de modifier ou d'enfreindre la loi."³ Further, whilst the malefactor could in many cases, with good reason, thus hope for impunity, the injured person was frequently obliged to forgo compensation. If the damage suffered by him resulted from the commission of a felony, he could not bring a civil action, until the offender was prosecuted and convicted—in which case the delinquent might be hanged and his goods forfeited to the crown, so that a suit would be useless.

¹ *Citizen of the World*, letter 1 ("An attempt to define what is meant by English liberty"); *Works* (London, 1854), vol. ii, p. 253.

² Cf. *infra*, essay on Romilly, chap. ii, sect. iii.

³ Voltaire, *Prix de la justice et de l'humanité* (1777), art. ii.

The number of capital offences was rapidly and indiscriminately augmented. The English penal code appeared to be a farrago of laws more sanguinary than those of the most benighted country on the Continent. Before the Revolution the statute-book contained some fifty offences for which the capital penalty might be inflicted. In the reign of George II, 63 new ones were added. In 1770 the number was estimated in parliament at 154,¹ but a little earlier by Blackstone at 160. A few years later, Romilly observed in his *Observations on a late publication entitled "Thoughts on Executive Justice"* (published 1786)—in which, as we shall see afterwards, he exposed some of the most striking anomalies of the criminal law—that the number had increased considerably in the sixteen years since the appearance of Blackstone's work. The same penalty of death was imposed, for example, on a man who stole a comparatively small sum of money or picked a pocket to the value of twelvecpence farthing, as on one who killed his parents, or on one who violated a defenceless girl and brutally murdered her.² No wonder then that very often injured persons refrained from prosecuting, juries from convicting, and witnesses from testifying, in the case of the lesser offences. Not infrequently were verdicts brought in obviously contrary to the evidence. Juries must certainly have come to regard their oaths with careless levity, when, in their desire to avoid the infliction of death on a wretched prisoner, they found that twenty golden guineas stolen by him were worth only thirty-nine shillings! Attempts to obviate excessive severity led to a fatal habit of excessive indulgence. And where guilt was established, and the capital sentence passed, it was in the great majority of cases not executed. We shall see these facts in detail in the later chapters devoted to Romilly, but for the present it will suffice to say that in the early part of the nineteenth century the proportion of executions to the number of capital sentences passed varied from a fifth to a ninth.³ The legislature and the executive were evidently unmindful of the incontrovertible principle emphasised by Montesquieu and by other clear-sighted writers: "La sévérité excessive des lois en empêche l'exécution; quand la peine surpasse toute mesure, le public, par humanité, pré-

¹ *Cavendish Debates*, ii, 12.

² For several other striking examples, see *infra*, on Romilly, in reference to his publication cited above, and to the bills introduced by him in the House of Commons.

³ Cf. G. R. Porter, *The Progress of the Nation*, etc. (1851), p. 635.

fére^{ra} souvent l'impunité." ¹ Apart from those who altogether evaded the execution of this law, many men were convicted who obtained a free pardon if they consented to enlist in the army.

The punishments that existed, say, in the reign of George II may be enumerated as follows: ²

1. Death in public, accompanied with torture, mutilation, and posthumous insult,—for the offence of high treason. The sentence was that the criminal be drawn on a hurdle to the place of execution, that he be hanged by the neck and then cut down alive; that his entrails be taken out and burned while he is yet alive; that his head be cut off; that his head and quarters be at the king's disposal.

This punishment was actually carried out (for the last time) in the case of some of those convicted of participating in the rebellion of 1745; but it had long been more usual to remit all the sentence except the beheading and disposal of the head.

The heads of traitors were set up over London Bridge.

2. Death in public by burning alive. This had been the punishment for heresy down to the reign of Charles II, and was still the legal punishment for treason when committed by a woman. The last instance is that of Elizabeth Gaunt, sentenced by Judge Jeffreys.

3. Death in public by hanging. This was the penalty assigned to the inordinate number of felonies already referred to. In the case of murder, the criminal's body, after execution, was liable to be dissected, under an act passed just before Blackstone wrote, for the benefit of anatomical science. Sometimes the body was hung in chains till it rotted, near the spot where the crime was committed.

(Death could never be legally inflicted except in public.)

4. Mutilations of various kinds. These are included by Blackstone among the legal punishments, but they were practically obsolete.
5. Whipping, in public or private; and in both forms applicable to both sexes.
6. The pillory; which might be a form of popular ovation, or a punishment only a degree short of death, according to the temper of the bystanders.

¹ *Esprit des lois*, liv. vi, chap. xiii. Cf. *supra*, on Beccaria, chap. ii.

² Taken from Sir R. K. Wilson, *History of Modern English Law*, pp. 61–63. For various illustrations see A. Andrews, *The Eighteenth Century*, pp. 269–305.

7. The stocks (used more in rural districts than in towns).
8. Placing in the "cucking-stool" and plunging in the water—used in the case of women and for one special offence.
9. Imprisonment.
10. Transportation.
11. Exile, in the form of "abjuration of the realm." This was only as an alternative sometimes permitted in lieu of the capital penalty, and was not actually pronounced as a formal sentence.
12. Forfeiture of all the offender's property, real and personal, usually accompanied by "corruption of blood," the effect of which was that no one could establish any legal right by tracing his descent from or through the offender.
13. Forfeiture of the offender's personal property, generally with the addition of a year's profit of his lands.
14. Fines.

The infliction of death by hanging was a very unequal punishment. Sometimes the death was lingering and unspeakably horrible; and the relatives and friends of a victim were known to lay hold of his legs when he was hanging in order to end his agony. The drop was introduced in 1760 in the execution of Lord Ferrers, but it did not come into regular practice until 1783.¹

The circumstances attending an execution amounted to nothing less than a gross scandal. The conveying in procession of the criminal from Newgate to Tyburn, a distance of over two miles, through the most crowded streets of London, offered—to use the words of Lecky—a "disgusting scene of ribaldry and profanity." "It is," says this judicial historian, "a curious illustration of the caprice of natural sentiment, that English opinion in the eighteenth century allowed the execution of criminals to be treated as a popular amusement, but at the same time revolted against the continental custom of compelling chained prisoners to work in public, as utterly inconsistent with English liberty."² The scandal of public executions was not entirely removed till our own time; but by an act of 1783 the coalition ministry abolished the procession to Tyburn, and provided for the execution of criminals in front of the gaol. It is worthy of mention that Dr. Johnson—like a good old tory, and representing, too, wide-

¹ Cf. J. W. Croker, *Correspondence and Diaries* (1884), vol. iii, pp. 15, 16; *Annual Register* (1760), p. 45; A. Andrews, *The Eighteenth Century*, pp. 276 seq.

² *History of England* (1887), vol. vi, chap. xxiii, p. 251.

spread views—denounced this alteration in the law, declaring that the age “was running mad after innovation,” and that even Tyburn was not safe from the fury of introducing new ways.¹

There were two kinds of prisons.² In the first place there was the common county gaol, in which a promiscuous collection of prisoners were confined—accused persons detained before or during trial; criminals sentenced to some other punishment, in the interval between judgment and execution; sometimes delinquents condemned to a term of imprisonment as a specified penalty; and insolvent debtors. A striking degeneration of English law is shown in the treatment of debtors; their long imprisonment was usually not so much for original debt as for an exorbitant accumulation of law costs. Secondly, there was the house of correction, popularly called a “bridewell,” destined for those who were sentenced to be confined, as a distinct punishment. But this intended discrimination was by no means invariably preserved. The buildings were in general badly constructed, dilapidated, ill-ventilated (windows being minimised to escape the tax), unhealthy, inadequately and too rarely cleaned. The dark, damp, subterranean dungeons reeked with an appalling stench and with pestilential effluvia. In many places there was no provision for bedding, or for straw to sleep on; when it was obtained, it remained unchanged for months. The prisoners were in the daytime bundled together irrespectively of sex, age, nature of the criminal, degree of guilt, children coming in contact with hardened criminals, those condemned for some slight offence mingling with habitual offenders; and during the night they were not always separated. Often lunatics were also added; and these were shown by the gaolers for money. The prisoners begged alms of the visitors and casual spectators; and demanded “garnish” of the newly arrived fellow-prisoners. No rational employment or honest occupation for the time being was assigned to them. In the bridewells hard labour frequently formed part of the sentence, but work was seldom done, partly owing to the absence of efficient superintendence, partly on account of the supposed danger of placing tools in the hands of the inmates.

¹ Cf. Boswell's *Life of Johnson*, Ed. G. B. Hill (Oxford, 1887), vol. iv, p. 188.

² Cf. G. Ives, *A History of Penal Methods* (London, 1914), pp. 171 *seq.* The classical sources of information on this subject are of course the invaluable works of Howard, *State of the Prisons in England and Wales* (1779), and *Account of the Principal Lazarettos in Europe* (1789), which enshrine the results of wonderfully wide, detailed, long-continued investigations prosecuted by a zealous, observant, noble mind.

No provision was made for instruction, religious, moral, or any other kind. Fighting, gambling, gaming, obscenity, and immorality prevailed within the dreadful walls—with little or no external interference. Gaolers, as they did not receive regular salaries, extorted fees from the prisoners, and trafficked in liquor with them; a profitable source of income was found in the drinking-taps. And such was the lamentable lack of discipline and organisation that the friends of inmates were admitted, and allowed to use the prison like a public-house. All this was rendered the more possible as, through the paralysed administration of the country in general, prisoners were in many cases farmed out to proprietors of gaols, as paupers were to the masters of workhouses. So that the goings on in these places of shame and horror were, for the most part, withdrawn from the eyes of the justices. Sometimes prisoners were kept in irons; and owing to the unsystematic gaol-delivery, many remained shut up for very long periods before trial. Thus—to give but one example—at Hull the assizes had been held once in seven years, and afterwards once in three. Whilst the moral conditions were so bad that the confined wretches could not but come out more vicious, callous, cunning, desperate, more learned in the various arts of crime, the physical conditions operated so terribly that a large proportion failed to come out at all. The close packing, the dirt, the foul air, the lack of water for drinking or washing, the absence of bedding, of sewers, the insanitary nature of the entire fateful establishment, the absence of infirmaries, the scandalous insufficiency of food (except where the inmates were able to buy it or obtain it from private charity)—all these circumstances co-operated, inevitably, to bring about a disease usually known as gaol-fever, which from time to time wrought havoc in many places. The gaolers themselves carefully avoided entering the cells; judges who in the course of their duty paid visits to them sickened and died; liberated prisoners when they were impressed for the navy spread the deadly infection on the men-of-war.¹

Another way of disposing of convicted malefactors was by transporting them to the American colonies—a practice which began in 1718. The prisoners were handed over by the government to a contractor who engaged to convey them to the scene of banishment, and there sold them to American planters for the

¹ Cf. *Vicar of Wakefield*, which was published in 1766. See also *infra*, chap. iv, sect. iii, in *fin.*, Bentham's trenchant account of the prevailing conditions of prison life.

term of their sentence. The system seems to have met, in certain respects, with some success. The new associations, the salutary agricultural labour, the strict supervision exercised, rendering impossible the continuance of vicious, nefarious practices, combined to effect a reformation in the case of even some of those who had before been the most abandoned criminals. Many of them, after the expiration of their term, became farmers and planters on their own account, and came to lead respectable lives, and in some cases even rose to wealth. The natural abilities of thieves, burglars, forgers, false coiners and other clever "enemies of society" were diverted to simple and more useful purposes; and their labour, especially in Maryland, was found to be such a valuable asset, that arrangements were made to convey them without any cost to government, which had before allowed five pounds a head.

The continuance of this system of sending convicts to America became impossible on the outbreak of the war. The declaration of independence by the North Americans saved them, as Bentham puts it, "from the humiliating obligation of receiving every year an importation of the refuse of the British population."¹ The problem as to what to do with the convicts henceforth presented great difficulties. The prisons at home were soon filled. A plan was first conceived for sending numbers of them to an island in the Gambia, but it was found impracticable. Accordingly, an act was passed in 1776² for establishing convict galleys. And, it appears, during a period of some nineteen years about 8,000 convicts were assigned to three vessels, one of them named the *Justicia* being moored at Woolwich, and the two others in Portsmouth and Langston Harbours.³ It is related by Howard⁴ that out of 632 prisoners on the *Justicia*, no fewer than 116 died within nineteen months. The prisoners on the hulks (as in the case of the prisons) were promiscuously herded together, and "vice, profaneness and demoralisation" were, in the circumstances, bound to become rife. Like other prisons the hulks were at first placed under the management of the local justices, who appointed the overseer. The latter, in the capacity of contractor, cut short the supplies of food, clothing, and other necessities. A committee of the House of Commons in 1832 actually described the wretched inmates of these floating cesspools of iniquity as

¹ *Works*, vol. i, p. 490.

² 16 Geo. III, chap. 43.

³ Cf. Colquhoun, *op. cit.*, pp. 299-309.

⁴ *State of Prisons in England and Wales*, 4th ed. (1790), p. 465.

“well fed, well clothed, indulging in riotous enjoyment by night, with moderate labour by day, so that life in them is considered ‘a pretty jolly life.’ ”

After the discoveries of Captain Cook in Australia, an act was passed in 1784 restoring the old method of transportation, and assigning the prisoners as servants of the contractor who undertook the business. In the years 1786, 1787 a new system was devised; and a great penal settlement was established at Botany Bay, under the governorship of Captain Phillip. The whole expense was borne by the government. Authority over the convicts was vested in the governor, who acted as their gaoler, and provided them with dwellings, food, and employment, either in public or in private works, and had the power to flog them even for minor offences. Serious flaws in the assignment system, uncertain and anomalous as it was, were scarcely preventable. The lot of convicts was unequal. The essential object of transportation, namely, to secure a plan of penal discipline and repression, was far from being realised. Little work was done by the convicts. Vicious practices prevailed among them. The masters, many of whom were themselves of bad or questionable character, failed to watch over their charges. Where flogging was considered an insufficient punishment for delinquents, they were returned to government, and then were sent to the road parties, the chain gang, or the penal settlements proper. The conditions of the latter were so horrible that, as it has truly been said, “the heart of a man who went to them was taken from him and he was given that of a beast.”

Attempts were made from time to time to mitigate some of the evils and abuses of the prisons at home. The act 23 Chas. II, c. 20, provided for the separation of insolvent debtors from felons. A statute of George II ¹ prohibited the introduction of spirituous liquor into gaols or workhouses; and the “Lords’ Act” passed in the same reign ² laid down among other things that creditors of imprisoned debtors should furnish fourpence a day for their maintenance. But these measures were systematically disregarded. Again, in 1773 a member of parliament, named Popham, exposed in the House of Commons the abuses arising out of the exaction of fees by gaolers, and endeavoured, without success, to carry a bill providing for their payment out of the county rates. In the same year an act was passed ³ to secure the appoint-

¹ 24 Geo. II, c. 40.

² 32 Geo. II, c. 28.

³ 13 Geo. III, c. 58.

ment of regular chaplains for the English county gaols. The following year Howard gave evidence before a parliamentary committee concerning the conditions of incarceration; the materials laid before them having been laboriously acquired by his personal examination of some fifty prisons. As a result—to which the zeal and philanthropic spirit of the Evangelicals had contributed much—two highly beneficent acts were immediately passed; one¹ prescribed elaborate regulations for the cleanliness and ventilation of prisons; the other² was directed against the practice of holding in confinement, because of fees due to sheriffs, gaolers and keepers of prisons, such men as had not been indicted or had been acquitted; it prohibited the exaction of such fees, and provided for their being paid out of the county rates. In 1778 Howard again gave evidence before a select committee of the House of Commons appointed to investigate the working of the hulk system established in 1776 by the act³ above referred to. He expressed his conviction that buildings were more suitable than vessels for the incarceration of prisoners. Several persons urged too that places of confinement should be erected like the Rasp- and Spin-Houses of Holland. Accordingly, Blackstone's and Eden's bill was passed in 1799.⁴ It embodies the first public recognition of a general principle of prison treatment. Its aim was "by sobriety, cleanliness, and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work and by due religious instruction to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection, and to teach them both the principles and practice of every Christian and moral duty." This bill has already been referred to in connection with Bentham's Panopticon scheme, and we have seen the delay and failure to carry it out.

It may be noted that at this time Pitt recognised the necessity of discriminating between the different kinds of offenders and the different degrees of criminality, and of averting the contagion of vice incidental to the prevailing conditions of prison administration.⁵

How to help discharged prisoners and what to do with them apparently presented insoluble problems. In 1799 Colquhoun issued a pamphlet in which he suggested the establishment of

¹ 14 Geo. III, c. 20.

² 14 Geo. III, c. 59.

³ 16 Geo. III, c. 43.

⁴ 19 Geo. III, c. 74.

⁵ Cf. *Parliamentary History*, xxviii, 1224.

a kind of charity organisation society to control the available funds and use them to the best advantage. He also advocated various remedies to alleviate the penal chaos, e.g. the institution of a metropolitan police force, the appointment of a public prosecutor, and even a large revision of the criminal law—which he saw, however, would not quickly come to pass. He was at this time in close communication with Bentham, who assisted him by drafting the Thames Police Act, which was passed in 1800 and gave effect to some of the plans for amelioration advanced by the great reformer.

But the governments of those days were not equal to establishing comprehensive and fundamental measures of criminal reform. Here and there we find, in the sphere of statesmanship, an ardent soul and penetrative mind—Burke, for example—condemning the existing confusion and irrationality of the law. This great political philosopher was in this, as in many other matters, an exception to the spirit of the time. He advocated the thorough revision of the penal code, which he denounced as “radically defective” and “abominable,” and consistently opposed the creation of new capital offences.¹ In 1773, in a speech on a bill for the relief of protestant dissenters, he referred to the criminal law, pointed out the absurdity of retaining criminal laws that frequently remained inoperative, the evils arising out of the desultory execution of such laws, which thus became in arbitrary hands instruments of oppression, and urged the necessity of bringing the law into harmony with the best sentiment and manners of the time. “The question . . . is,” he observed, “whether in a well-constituted commonwealth, which we desire ours to be thought, and I trust intend that it should be, whether in such a commonwealth it is wise to retain those laws, which it is not proper to execute. A penal law, not ordinarily put in execution, seems to me to be a very absurd and a very dangerous thing. For if its principle be right, if the object of its prohibitions and penalties be a real evil, then you do in effect permit that very evil, which not only the reason of the thing, but your very law, declares ought not to be permitted; and thus it reflects exceedingly on the wisdom, and consequently derogates not a little from the authority, of a legislature, who can at once forbid and suffer, and in the same breath promulgate penalty and indemnity to the same persons, and for the very same actions. But if the

¹ Cf. *Parliamentary History*, xxviii, 146.

object of the law be no moral or political evil, then you ought not to hold even a terror to those, whom you ought certainly not to punish—for if it is not right to hurt, it is neither right nor wise to menace. Such laws, therefore, as they must be defective either in justice or wisdom, or both, so they cannot exist without a considerable degree of danger. Take them which way you will, they are pressed with ugly alternatives. First: All penal laws are either upon popular prosecution, or on the part of the Crown. Now if they may be roused from their sleep, whenever a minister thinks proper, as instruments of oppression, then they put vast bodies of men into a state of slavery and court dependence; since their liberty of conscience and their power of executing their functions depend entirely on his will. I would have no man derive his means of continuing any function, or his being restrained from it, but from the laws only; they should be his only superior and sovereign lords. Second: They put statesmen and magistrates into an habit of playing fast and loose with the laws, straining or relaxing them as may best suit their political purposes; and in that light tend to corrupt the executive power through all its offices. Third: If they are taken up on popular actions, their operation in that light also is exceedingly evil. They become the instruments of private malice, private avarice, and not of public regulation; they nourish the worst of men to the prejudice of the best, punishing tender consciences, and rewarding informers. Shall we, as the honourable gentleman tells us we may with perfect security, trust to the manners of the age? I am well pleased with the general manners of the times; but the desultory execution of penal laws, the thing I condemn, does not depend on the manners of the times. I would however have the laws tuned in unison with the manners;—very dissonant are a gentle country and cruel laws; very dissonant, that your reason is furious, but your passions moderate, and that you are always equitable except in your courts of justice.”¹

Later, as we shall see, Romilly made herculean efforts to mitigate the severity of the law, and to place the penal system on a reasonable basis. But the generality of legislators and statesmen were for a long time indifferent to the crying scandals of this portion of English jurisprudence; and the debates on the subject in parliament were thinly attended and badly reported.

¹ “Speech on the second reading of a bill for the relief of protestant dissenters” (1773), *ad init.*

CHAPTER III

BENTHAM'S FUNDAMENTAL DOCTRINES. RELATION OF CRIMINAL LAW TO THE PRINCIPLE OF UTILITY. BENTHAM'S AIM AND METHOD

WE are now concerned mainly with Bentham's work in the sphere of criminal law. But to understand thoroughly his views and achievements in this respect, it is desirable to make a few observations on his fundamental doctrines regarding ethics, politics and government, and civil law. We shall then see that his work in penal jurisprudence is not an isolated portion of his prolific activity, but is indissolubly connected with the rest of his system, and is indeed a logical outcome of his basic principles.

(i) ETHICS—UTILITARIAN BASIS

It has already been pointed out that Bentham was not the first propounder of the utilitarian principle, which is throughout considered by him as the indispensable criterion of all legislation and all conduct. He avows, indeed, his indebtedness to Paley for the phrase, "the greatest happiness of the greatest number," but through his lack of the historical sense and through his stupendous confidence in his own data and logical processes, he almost entirely disregarded previous investigators of similar or cognate fields of inquiry; and so he failed to take due cognisance of the contributions of writers like Priestley, Abraham Tucker, John Gay, Hutcheson, and others. The influence of Hume, Helvétius, and Beccaria, however, he did not neglect to acknowledge; and it was with delight he met at Bucharest a young man reading the *De l'Esprit*.¹ Gay and Tucker had already, in their exposition of sanctions, eliminated to a large extent theological accessories. But Bentham's originality lay in emphasising and extending this point of view, in an uncompromising deduction of conclusions from his premises, in insisting throughout that the promotion of general happiness must necessarily be the invariable aim of the legislator and the moralist, in requiring the

¹ *Works*, vol. x, p. 56.

nature of conduct to be estimated by its consequences and not by obscure underlying motives, and, generally, in the thorough-going application of his essential doctrine to all departments of human thought and human activity. Bentham did not, in fact, come to proclaim a new system of conduct; for the morality prevailing in his time was really utilitarian in substance. His distinctive message lies more in his method than in his positive doctrine.

The utilitarian principle, then, claimed as self-evident, is for Bentham the essential guide, the test and measure of all virtue; and the principles inconsistent with it, for example, those of sympathy, antipathy, asceticism, and the like, he rejects entirely. The "ascetic" view, he holds, appears to condemn pleasure as a whole, whereas it really does nothing more than assume that certain pleasures can be procured only at an excessive cost of pain. On non-hedonistic systems of ethics in general he pours contempt; they make morality arbitrary, and disregard "eternal standards." He contends that the only sovereign masters to which conscious beings are subject are pleasure and pain, which are *facts*, real things, whose manifestations are indisputable, ubiquitous, perceptible by all sentient creatures; and which are worthy, therefore, of furnishing a proper foundation for a science. The greatest happiness of the greatest number is to be the universal rule and the unfailing object; and the various means that lead to it constitute "justice." It is to be the permanent foundation on which the whole edifice of morality as well as of law and of politics is to be erected. The sole aim, the true good, of man is found in happiness. The moral judgment is only a way of judging happiness. Happiness is the "sum of pleasures." And all pleasures are, at bottom, equal in value; that is, there are no qualitative distinctions, as all concrete differences are determined by differences of intensity and quantity or permanence. Every person is inevitably and ceaselessly engaged in the quest of his own happiness—not necessarily by the pursuit of immediate pleasure, but by doing that which, even at the cost of present pain, would eventually secure him a balance of pleasure—and each one is the best judge as to what will procure him happiness. So when each individual member of the community succeeds in attaining the greatest happiness possible to him, it follows that the greatest aggregate of happiness would accrue to the community. And this greatest totality

of happiness must comprehend the happiness of the greatest number; that is, it includes on the one hand intensity and quantity of happiness, and on the other the largest number of persons among whom it is shared. (In the latter portion of his life and work Bentham recognised that the famous formula "the greatest happiness of the greatest number" was deficient in exactness and clearness, and therefore curtailed it to the simpler form "the greatest happiness.") The legislator, like everyone else, must incessantly be actuated by the desire to "maximise" happiness; and in seeking to influence conduct, he will impose "sanctions"—divisible into physical, political, moral or popular, and religious—that is, he will attach pains or pleasures to given classes of actions. To be affected by a sanction is tantamount to being under an "obligation."

To determine what modes of action will conduce to the desired object, and what motives or springs of action are best calculated to bring them about, Bentham drew up tables of motives, which appear extraordinarily exhaustive, but betray a somewhat mechanical psychology; and despite their elaborate classification some of the highest and most powerful springs of action are omitted, such as "conscience," "moral duty," "sense of honour," "principle," etc. He sets forth the measure of pleasure and pain, considers the different kinds, classifies them; he shows how different persons vary in their sensibility to them, and gives a list of thirty-two "circumstances influencing sensibility." He points out that the "sanctions" will not, of course, possess a uniformly operative force, but will act differently in different cases.

The nature of "intention" depends on the consequences contemplated. Motives, modifiable by the imposition of "sanctions," are not in themselves bad, and are either "internal," namely anticipated pleasure or pain, or "external," that is the event producing the anticipation. Thus the character of conduct is determined not by "motives," but by the nature of the "consequences." The fundamental doctrine of jurisprudence is, then, equally applicable to the sphere of ethics. The relation between jurisprudence and ethics is well known to be a vexed question. Bentham attempts to distinguish them in this manner: "Where legal rewards and punishments cease to interfere with human actions, there precepts of morality come in with their influences. . . . In a word, deontology or private ethics may be considered the science by which happiness is created out of motives extra-

legislational, while jurisprudence is the science by which law is applied to the production of felicity.”¹ We need not here inquire into the logical cogency of this distinction.

(ii) POLITICS AND GOVERNMENT

Bentham's views and speculations on politics and the work of government are of a less exhaustive character than those on jurisprudence, but they are none the less of considerable interest and importance in the history of political science. He discussed questions of free trade and colonial expansion, and presented luminous schemes for parliamentary reform. He went to the very foundations, and made a vigorous attack on the oft-proclaimed “wisdom of our ancestors” and the constantly vaunted “matchless constitution.” Brought up a tory, he soon became a radical; his critical temperament and penetrating vigilance eminently fitted him to be always in the opposition. Here, as everywhere, he introduces his touchstone of utility, maintains that it is the indispensable criterion of political virtue, and that the paramount aim—indeed the indefeasible obligation—of the statesman is to secure and minister to the general happiness of the community. He assails the fiction of a compact between king and people. Montesquieu's and Blackstone's ideal form of constitution, embodying a blend of monarchical, aristocratic, and democratic elements, which are represented by king, lords, and commons, was weighed in Bentham's balance of “utility” and found to be wanting in many respects.² He thoroughly detested the abstract “rights of man” theory, which he regarded as a “hodge-podge” of fallacies. But he was also opposed to Burke's romantic deification of the British constitution. In his eyes both Paine and Burke were alike sophists, the one spinning out logical, the other sentimental, sophistries. In his consideration of constitutional government he scarcely pays heed to the questions as to what authority the people should be subject to and how their obedience should be secured; he is, rather, especially concerned with the means available for preventing abuses of power. He is in favour of individualism, but not to the extent of Jacobin absolutism, which is antagonistic to his empirical

¹ *Deontology*, vol. i, chap. ii, p. 27.

² Cf. his *Fragment on Government*, referred to *supra*.

method.¹ The less government the better.² The individual citizen is to be allowed to seek his own pleasures, and live his own life according to his lights—the intervention of government being necessary only to protect him from molestation or suffering, by instituting rights and obligations, and definitely promulgating them in legislative enactments. “Security” is the first indispensable condition of happiness, “equality” being only secondary. His “laissez-nous faire” principle, pithily interpreted by him by the words “be quiet,”³ was opposed to all such restrictions on the free activity of a subject as were not essential for securing similar liberty on the part of fellow-citizens; so that, conformably to this doctrine, all legislative limitations and interference, not manifestly justifiable on some clear utilitarian ground, should be removed. Indeed, the drift of his argument in his *Manual of Political Economy*⁴ is to the effect that almost all legislation is improper, and that industry needs only freedom and security.

In case of difference of views as to the policy to be pursued, the majority of the nation should exercise control, and the predominating public opinion will indicate the direction that may legitimately—in fact must necessarily—be taken. The existence of such majority and the fulfilment of its wishes will constitute the only guarantee that its interests, and on the whole the interests of the community at large, are identical with those of the governing authority. (Here Bentham did not fully recognise the corrective effect of a standing opposition.) In large states, of course, the rule of the majority will take the form of representative government. The people will elect “morally apt agents” to represent them, and not those who are animated by “sinister interests,” and who consider the welfare of their class rather than that of the entire nation. These “agents,” as members of the legislature, are to be merely “deputies,” and not “representatives” in the ordinary sense of the term, and are to be ever subject to the vigilant control of the public. They are not to be re-eligible until after a certain interval has elapsed. This political system will dispense alike with king, house of peers, established church. Universal suffrage, annual parliaments, and vote by ballot will obtain; and women, equally with men, will exercise

¹ As to his attitude to the French Revolution, see *supra*, chap. i, *sub ann.* 1789–1790.

² With regard to the growing feeling against government interference, see the previous chapter, sect. (ii) *ad fin.*

³ *Works*, vol. x, p. 440.

⁴ Vol. iii, pp. 33 *seq.*

the rights of franchise.¹ The officials in all departments of state are to be appointed only on the results of open competitive examinations, and then are to be constantly inspected and their accounts checked by the public. Bentham strongly advocates the principle of "responsibility"; but in association with this he urges his rule, "minimise confidence." ■ Thus, in a democratic community, the greatest happiness of the greatest number will be the maxim and unvarying guide of all public activity.

(iii) CIVIL LAW

In the sphere of civil law Bentham is indebted to Hume for his criticism of the prevailing contractual conception, and of the theory of the right of property. The *Commentaries* of Blackstone appeared before the work of Bentham; but the former was only an expositor of the law as it was and relied on erudition, the latter was a critic, a censor, pointing out what the law ought to be, and relied on forcible ratiocination rather than mere learning. The purpose of civil law, Bentham holds, is to secure a clear definition of rights and obligations, and to fix specifically their reciprocal relationships. He regards legislation as a science, not based on *a priori* dogmas, but an empirical inductive science, founded on obvious indisputable facts perceptible in human nature, and embracing therefore a body of conclusions, which are the natural and necessary outcome of those facts. The complicated, inharmonious character of existing English law, due to a precarious haphazard development, was unsuited to the needs of the time. Partial modification or amendment would scarcely suffice. To effect a real legislative improvement it was necessary to bring about an almost entire transformation, wellnigh a reconstruction *de novo*. In carrying out this work, the eye of the legislator must be constantly turned to the dominant principle of utility, and every provision he makes must be calculated to promote the greatest happiness of the community at large, by preparing the way for the establishment of such conditions as will, probably, favour the prosperity of subjects and produce all the happiness possible to human beings. A comprehensive scientific synthesis is facilitated, as law is concerned with external actions and contemplated consequences, rather than with motives and inward feelings which constitute the special subject-matter of ethics.

¹ *Works*, vol. iii, p. 463.

■ Vol. ix, p. 62.

before 13
 Bentham mercilessly assailed the all-pervading technicalities, the antiquated methods, and the traditional procedure. For him "technical" meant "fee-gathering." The sinister association of "Judge and Co." had tacitly come into being; and the object of judges, advocates, attorneys, and officials was to prolong and multiply suits, and to complicate the proceedings in order to fleece litigants. The greater part of "writs of error" amounted to little more than "shams," or devices for delay, by which the Chief Justice reaped a rich harvest of fees.¹ The Court of Chancery was, in this respect, the supreme offender; and under Lord Eldon, who was in the eyes of Bentham the very incarnation of obscurantism and hostility to reform, equity had become transformed into "an instrument of fraud and extortion."² Bentham's severe censure was not unjustified. Others, usually more moderate in tone and expression, gave vent to very strong animadversions in regard to that court. Thus Romilly described it as a "disgrace to a civilised nation,"³ and Erskine said that if there was a hell, the Court of Chancery was hell.⁴ Bentham enumerates some twenty contrivances adopted by the courts, which tended to produce delays and injustice—and fees. He describes the elaborate and confusing steps to be taken before a hearing could be secured; the long, inconvenient journeys of litigants; the chicaneries involved in the rules as to the giving of notice; the frequent nullification of all that had been done owing to some technical flaw; the concealment of the substance of the proceedings from the public on account of the jargon Latin and law-French that interlarded them; the conflict of jurisdictions; the opposition between law and equity; the capricious fabrication of new "pleas" and new technical regulations; the complicated obscure provisions respecting "special pleading," and so on. "Judge-made" law—which is as bad as priest-made religion—had wrought havoc in English jurisprudence. Legal fictions amount to nothing more than lies; the leave obtained to resort to them is simply a "mendacity licence." A system of rules had been elaborated for excluding evidence, so that many matters were not admitted that were material and relevant.⁵ Bentham observes that merely to suspect evidence

¹ See *supra* as to his pamphlets *A Protest against Law Taxes and Supply without Burden*.

² *Works*, vol. v, p. 349. See also *supra* as to his publication *Indications respecting Lord Eldon*.

³ See *infra*, on Romilly.

⁴ Cf. *Works*, vol. v, p. 371.

⁵ Cf. *supra* his *Rationale of Evidence*.

should not be a sufficient reason for rejecting it altogether. In the civil courts plaintiff and defendant were condemned to sit as silent spectators, even in the event of a gross miscarriage of justice; Bentham deems it barbarous to prohibit them from testifying to facts within their knowledge. He shows how the trustworthiness of evidence may be affected by the various "springs of action" and "sanctions," and points out the means available for securing truthful evidence, and for estimating the probability of its truth. He considers the administration of oaths to be a valueless proceeding.¹ Further, not only should the law of evidence be refashioned, but poor litigants should be supplied gratuitously with legal aid. The duties and fees of advocates should be specifically prescribed. None from among their ranks should be appointed judges—to do so is as expedient as putting a procuress at the head of a girls' school.² Judges should everywhere be accessible, and always under the supervision of the public. They should not be permitted to lay down a new rule of law; but when matters arose for which the existing law was inadequate, they should suggest amendments to the legislation. Thus it may be said briefly that as against the technical, inconsistent, unintelligible, fee-extorting concoction of English law—by which money and knavery were enabled to triumph over poverty and honesty—Bentham demanded a simple, clear, systematic code based on utility, and aiming at equality and justice, cheapness and expedition in procedure.

One or two other matters remain to be mentioned. The laws relating to bankruptcy, insolvency, and imprisonment for debt were shown by Bentham to be needlessly complicated, outworn, and badly administered. The assets of debtors, instead of being used for the "undignified purpose" of paying their debts, were diverted to "the dignified function of contributing to the fund provided for the remuneration of legal science." The debtor's estate was plundered by the assignees; and the severe penal provisions proved, through their extreme rigour, to be ineffective—for defrauded persons frequently refrained from prosecuting rather than set in motion the ferocious and blood-thirsty law. Bentham demanded a simplification of the distinction between insolvency and bankruptcy; the confusing rules had brought only suffering to suitors and emoluments to lawyers. The power of the creditor to imprison indefinitely an insolvent debtor should

¹ Cf. *supra*, *Swear not at all*.

² *Works*, vol. ix, p. 594.

be ended; and the exaction of fees by gaolers should be forbidden. Bentham did not advocate the entire discontinuance of imprisonment for debt; but he assailed the practice of arrest on mesne process, and condemned all punishment where there was no blame.

His attack on the poor law and on the law of settlement has already been referred to; and we have seen that his suggestions for a reconstruction of the entire law on the subject constitute a luminous and comprehensive contribution to one of the most difficult portions of national jurisprudence and political economy.

(iv) CRIMINAL LAW

Writers like Montesquieu, Voltaire, Beccaria had on the Continent prepared the way for more rational conceptions of criminal law, and for a more humane treatment of criminals. In England we find echoes of Beccaria in Blackstone's *Commentaries*, of which the first volume appeared the year after the publication of the Italian writer's treatise (1765). Blackstone (like his predecessor) considers it wrong and absurd to apply the same punishment to totally different offences and to the same kind of crimes varying in heinousness; he holds that certainty of punishment has a greater deterrent effect than severity, which not infrequently means impunity; he deplores the existence on the statute-book of such a great number of felonies without benefit of clergy. But he failed to detect the fatal fallacies that punishment ought to be increased in proportion to the increase of temptation, and that the degree of culpability ought to be made to depend on the facility with which the crime might be committed. William Eden,¹ afterwards Lord Auckland, made some little advance by his book *Principles of Penal Law*, published in 1771; he declared himself an opponent of the barbarous practice of the criminal law. Lord Kames² attacked the system which permitted the infliction of capital punishment for numerous offences, some of them comparatively trivial, and condemned harshness and severity in general. The protests of laymen were not wanting. Dr. Johnson,³ who was far from being a sentimentalist or an innovator, advocated the restriction of the supreme penalty to cases of murder, and found fault with the prevailing "disproportion between crimes and punishments,"

¹ See *supra*, on Beccaria, chap. iv.

² *Historical Law Tracts. Criminal Law* (1776).

³ *The Rambler*, No. 114 (1751).

the "capricious distinctions of guilt," the "confusion of remissness and severity," the multiplication of capital offences, the infliction of the same penalty for crimes "very different in their degrees of enormity," the assumption that "inflexible rigour and sanguinary justice," and a "periodical havoc of our fellow-beings" will prevent crimes or lead to reformation. He observes that "from this conviction of the inequality of the punishment to the offence proceeds the frequent solicitation of pardons." "Whatever may be urged by casuists or politicians, the greater part of mankind, as they can never think that to pick the pocket and to pierce the heart is equally criminal, will scarcely believe that two malefactors so different in guilt can be justly doomed to the same punishment. . . . Till we mitigate the penalties for mere violations of property, information will always be hated and prosecution dreaded." Thus relaxation in the laws, argues Johnson, will obviate the frequent impunity that obtains. Similarly, Goldsmith could not "avoid even questioning the validity of that right which social combinations have assumed of capitally punishing offences of a slight nature."¹ Again, Fielding thought the increase of crimes due to the great abuse of pardons (a practice resulting unavoidably from the excessive rigour of the criminal law), and suggested that the number of executions should be diminished, and that the tragic farce of public executions should be abolished.² Howard, too, condemned the evils of public executions, recommended the restriction of capital punishment to only three or four offences, exposed the scandalous conditions in gaols, and proposed various measures of amelioration.

What of Bentham? Once more he proved himself, in the field of criminal jurisprudence as in many other departments of law and politics, a sounder, more rational, a more systematic and comprehensive thinker than his predecessors. This will be seen more fully in the next chapter; for the present it will suffice to point out very briefly some of his leading principles. Montesquieu had maintained that laws were "*rappports nécessaires qui dérivent de la nature des choses*," and had insisted on the existence of certain equitable relationships as being prior to all positive law, in that "*un être intelligent qui a fait du mal à un être intelligent mérite de recevoir le même mal*." The imposition of

¹ *Vicar of Wakefield*, chap. xxvii. Cf. his *Citizen of the World*, letter lxxix.

² Cf. *Enquiry into the late increase of Robbers* (1751).

penalties, he held, must proceed not from the caprice of the legislator but "de la nature de la chose."¹ Bentham rejects these fundamental conceptions. He considers Montesquieu's doctrine to be founded on the arbitrary principles of sympathy and antipathy, and points out that the idea of an offence "deserving" punishment and "being equivalent" to the penalty, and the reference to the fiction of the "nature of the thing" can lead only to passion, error, confusion, and precarious artificiality. To adopt such principles of penology would be to subject reason and utility to the tyrannical dominion of anger and revenge. Instead of giving way to the promptings of blind instinct and feeling—the essential attributes of the brute creation—we should apply the methods of calculation, of a careful quantitative adjustment, in the consideration of means and ends; and so we shall arrive at rules susceptible of universal application. We must ever bear in mind the effects contemplated—the consequences of the offence committed and those of the penalty to be prescribed. The aim and purpose of criminal jurisprudence may be, immediately, to punish the malefactor, but ultimately and essentially should be to repress crime and prevent its commission. In other words, the vital object is to secure to society the fullest possible protection, and not to inflict torments on the offender. For punishment necessarily implies pain, and pain is an evil; therefore, punishment is, from the point of view of utility, intrinsically an evil, and to that extent is not distinguishable from the offence. The infliction of a penalty is a kind of counter-offence committed under sanction of the law. Pain is common to the two; but the difference between them is a difference in the direction and incidence of the pain. For in the case of the offence one person inflicts suffering (including the consequent alarm) on many, that is on the community at large, for his own personal profit; whilst in the case of the penalty many, that is the community, inflict pain on one for the sake of the general good. Accordingly punishment is to be imposed only when it excludes greater evil. With this view and to this extent is punishment indubitably justifiable. It will clearly be unjustifiable if it is "groundless," "inefficacious," "unprofitable," or "needless"—as, for example, where the object may be attained "as effectually at a cheaper rate"—for in

¹ Cf. *Esprit des lois*, liv. i, chap. i; liv. xii, chap. iv. See also *supra*, on Beccaria, chap. ii.

certain cases reason rather than physical force may be the appropriate remedy.

After setting forth the limits of legislative interference, by distinguishing the obligations incidental to morality from those imposed by law, he expounds the factors that should determine the selection of punishments, and what attributes punishments are to possess to render them capable of fulfilling their aim. The pain of punishment must exceed—and only just exceed—the profit of the offence, and also the profit of undetected delinquencies when the particular offence in question betokens a habit. The penalty must be of such a kind as to cause a would-be malefactor to choose a less rather than a greater offence, as, for example, larceny rather than robbery with violence. The penalty must fit the crime. It must be capable of adaptation to the varying sensibility of criminals, so that different offenders may receive different penalties for similar offences. In proportion as it decreases in certainty, it must increase in "value," that is in severity. The punishment should follow the offence as closely as possible. There are certain punishments which, though customarily inflicted, are obviously mistaken or misapplied. To preserve due proportion, and achieve the essential object of all penal provisions, a "lot" of punishment must be characterised by certain properties: it must be variable, equable, commensurable, characteristic, exemplary, frugal, revocable, reformatory, disabling (from future offences), compensatory (to the persons injured), not unpopular, capable of simple description.

If these brief considerations do not definitely show that Bentham's point of view and treatment of penal law are incomparably superior to those of his predecessors and contemporaries, it will no doubt be seen presently, when his work on penal justice is set forth at greater length, that his views are the very incarnation of light and reason, as compared with the conceptions and practices of the time—the caprice, the barbarity, the inconsistency, the blundering aimlessness, the arbitrary attitude, the indiscriminate excessive punishments, the resulting frequent impunity, the disastrous gaol system, and the other evils, all conspiring to make the criminal law and penal administration nothing less than a consummate national folly. Bentham, meditating on the causes of this condition of things, observes in an unpublished note that was intended for subsequent expansion: "It is a melancholy and unhappily but too indisputable

a truth that in England more instances happen of thefts, robberies, and other crimes of indigence (murder out of question) than in any other country in Europe. The question is, how comes this? The answer is, a mixture of false humanity, timidity, and indifference in the ruling powers. From an almost total neglect of a prejudice against those expedients for enforcing penal ordinances and magnifying the effect of them, which common sense grounded on experience has dictated to most other nations.—Then paint the mixture of timidity, disdain, pride, and meanness that prevails at present among statesmen.”¹

(v) BENTHAM'S AIM AND METHOD

It will already have been perceived that in all Bentham's inquiries and expositions his unvarying aim is to get at the real—to disengage what is concrete and cognisable by actual experience from the *a priori* assumptions and fictions of theoreticians, and the prejudices and superstitions of traditionalists. He was ever disposed to ask the why, the wherefore, the whither of every rule, of every institution, of everything. His spirit was pre-eminently a questioning spirit; he was, as John Stuart Mill says, “the great questioner of things established.”² Independent, self-reliant, vigorous, indefatigable, dauntless, he was admirably fitted to overhaul the entire system of social, political, legal, and judicial organisation, weigh every portion of it in his consistent balance, point out the inherent fallacies, show how they were radically detrimental to the true object and interest of a civilised community, and suggest at great length measures of reform. Thus he would do away with the inconsistencies and vagaries of judge-made law, build up a more appropriate systematic law, simplify it, codify it and so make it public and intelligible to all. He was an arch-innovator, not only as regards essentials, but also in respect of details. In every subject he took up—and what did he not deal with?—he poured forth an amazing multiplicity of details, which by their novelty, freshness, coherence, abundance inspired opponents with awe and wonder, and frequently silenced would-be adversaries.

His method constituted a formidable and an invaluable instru-

¹ From MSS. at University College, London, No. 67 (Penal Code). Quoted by Halévy, *La formation du radicalisme philosophique*, vol. i, p. 128.

² *Dissertations and Discussions* (London, 1867), vol. i, p. 332.

ment of investigation. By means of his dichotomous classification, which he aims at making "natural" rather than "technical," together with his method of exhaustion—which had been adopted so effectively by that other critic and innovator, Socrates—he analysed out every complicated institution into its constituent elements, separated truth from error, realities from mere abstractions, the useful and expedient from the useless and noxious accretions. His interminable divisions and subdivisions pursued and penetrated the venerable pretence of accepted generalities, exposed their real significance, and showed that phrases and catchwords, no matter how long they may have been sanctified, did not necessarily enshrine truth and wisdom. He demanded something more than mere opinion as a foundation for a social and legislative edifice; and, what is more, he wanted to know what was the ultimate basis of that opinion itself. Facts were to him more precious and sacred than all the ingenious speculations of all the philosophers; and his main facts, as he held, were to be readily apprehended by observing the manifestations of human nature. Such facts demonstrated the universal desire for pleasures and aversion from pain, and consequently the applicability of the utilitarian test—a test that showed up the evils and deficiencies of prevailing rules, devices, theories, fictions, technicalities, traditions, practices, institutions, systems. Thus his conclusions—both those issuing from his destructive criticism and those arrived at in his constructive work—are ostensibly referable to this fundamental principle of utility; but in the main they may well be accepted by us without any formal adherence on our part to "utilitarianism," for they proceed from common sense, a priceless treasure that is acceptable to all schools of social philosophy.

The superiority of Bentham's method to that of even eminent writers like Montesquieu is apparent. His views and generalisations are reinforced by a rich fund of illustration. But, unlike Montesquieu, he does not give a superfluity of extraneous facts and anecdotes, which, in the case of the French writer, sometimes conceal the underlying principles instead of fortifying them and shedding light on them. Occasionally the classification of Montesquieu's material appears scarcely relevant; for he allows himself to set forth a special heading or section, avowedly enunciating a principle, for the sole purpose of introducing a singular story. Again, Bentham sifts and weighs his facts with

greater care and discrimination, and estimates with greater accuracy their material relevance and value. On the other hand, a statement or figure seen in a book would seem to the author of *Esprit des lois* to be sufficient and at times even final. Whether such accepted "facts" originate from the west or from the east, from his own country or from the kingdom of Bantam, appears to matter little; whether the statements possess intrinsic probability—as, for example, the report that in some countries there are ten women to one man—remains not infrequently unquestioned. Voltaire deplored this conspicuous defect of his countryman: "Est-il possible qu'un homme sérieux daigne nous parler si souvent des lois de Bantam, de Macassar, de Borneo, d'Achem; qu'il répète tant de contes de voyageurs, ou plutôt d'hommes errants, qui ont débité tant de fables, qui ont pris d'abus pour des lois, qui sans sortir du comptoir d'un marchand hollandais, ont pénétré dans les palais de tant de princes de l'Asie?" The questioning temperament, the independent spirit, the level-headed nature, the scientific attitude, the passion for logical exactitude of Bentham would not let him brook such things. He was able, equally with the best, to launch forth aphorism and epigram; but he disdained to make use of stylistic decoration as a substitute for cogent reasoning based on examined facts. He even endeavoured to give a mathematical rigour to his argument by selecting, defining, and consistently adhering to a special terminology, by his constant regard for the exigencies of syllogistic reasoning, and by making use of his "moral arithmetic" and "felicific calculus." He was throughout bent on attaining objectivity and precision, setting forth reality, avoiding metaphysical vagueness, casuistic plausibility, gushing sentimentality; he worshipped at the shrine of logic and, though a markedly humane man, spurned the blandishments of "humanitarianism."

And so he devoted himself to the experimental method, applying a species of Newtonianism to the realms of morals, politics, and law, and endeavouring to transform those subjects from the confusion and prolixity into which they had fallen into the order and systematic coherence of exact verifiable sciences. In such a large task it were impossible for anyone to succeed completely, and to avoid prejudices and errors of one kind or another. Bentham set store by the analytic method to an undue extent, and paid little or no regard to conceptions of historical evolution. History he must have considered, after the

manner of Voltaire, to be nothing more than a record of the follies and crimes of mankind. He failed to take into account the notion of organic development as applied to the nature and growth of institutions, and looked with even less esteem on the work of historians than on the productions of previous thinkers. Therefore he was but too prone to deny or disregard facts that did not come within his own experience; and he refused to recognise truths that happened to be inconsistent with his essential doctrines. Had he adopted a comparative point of view, and taken into account the products of other ages, nations, workers, had he possessed a more intimate knowledge of his fellow-creatures, he would have been able to steer clear of those prejudices and mistakes. Nevertheless, by dint of iteration and reiteration—an additional weapon of his wielded with drastic effect—his criticism and teaching in course of time acquired irresistible force, and ultimately achieved a signal triumph.

CHAPTER IV

BENTHAM'S VIEWS ON PENAL LAW ¹

(i) OFFENCES ²

"THE object of this part is to describe offences, to classify them, and to point out the circumstances by which they are aggravated or extenuated. It is a treatise upon diseases, which of necessity precedes the inquiry as to cures." ³

An offence is, in reference to an established legal system, whatever is prohibited by the legislator, whether for good or for bad reasons. In reference to the principle of utility, it is an act which ought to be forbidden by reason of some evil that it produces or tends to produce. (Bentham uses the word in the latter sense.) Offences are divisible according to the classes of persons injured: private, reflective (against oneself), semi-public (affecting a part of the community, or particular district), public. ⁴ Each of these may be divided according to the object, condition, or relationship injured. ⁵ Other classifications are: complex, simple; principal, accessory; positive, negative (i.e. negligence); real, imaginary (i.e. acts which produce no real evil, but which prejudice, mistake, and the ascetic principle have made offences; they vary with time and place, e.g. heresy, sorcery, etc.). ⁶ A further division may be made according as the offence is directed against the person, property, reputation, or condition. ⁷ The enormity of the evil inflicted (evil of the first order) depends on the amount of physical pain, terror, disgrace, irreparable

¹ The brief analysis here presented is based on *Principes du code pénal* in Dumont's *Traité de législation*, 3 vols. (Paris, 1802) (trans. by R. Hildreth [London, 1891]), on *Principles of Penal Law* in Bowring's edition of Bentham's *Works*, vol. i, pp. 365-580—edited from Dumont's *Treatise* and the original MSS. of Bentham—and on other writings relating to criminal law. Bowring's classification is arranged thus: Part I, Political remedies for the evil of offences; Part II, Rationale of punishment; Part III, Indirect methods of preventing crimes. (A new translation of the *Traité*, by C. M. Atkinson, was published in 1914 [Oxford University Press].)

² Cf. *Introduction to Morals and Legislation*, in *Works* (Ed. Bowring), vol. i.

³ *Treatise on Legislation* (Ed. Dumont), *Principles of the Penal Code*, Part I, Introduction.

⁴ *Ibid.*, chap. i.

⁵ Chap. ii.

⁶ Chap. iii.

⁷ *Works*, vol. i (*Principles of Penal Law*, Part II, bk. i, chap. ii), p. 390.

damage, suffering due to the peculiar sensibility of the injured person.¹ The alarm inspired by offences (evil of the second order) is due to the extent of evil of the first order, the offender's intention (gauged by his state of mind—knowledge, ignorance, or misinformation),² the position which has given him an opportunity to commit the offence (e.g. the amount of trust or power placed in him),³ his motive, his character, the facility to prevent like offences or to conceal them, the condition of the injured party, by virtue of which those in a like condition may or may not be inspired with fear.⁴

As to the effect of motives on alarm, Bentham says that if the offence proceeds from a rare motive, belonging to a class of motives small in number, the alarm will be small; if from a motive common, frequent and powerful, the alarm will be greater, in that a larger number of persons will be affected. To speak of motives as *good* or *bad* is erroneous; for every motive is, ultimately, the prospect of a pleasure to be procured, or of a pain to be avoided. The same motive may give rise to laudable, as well as to criminal, actions. Motives may be classified according to the tendency they seem to have to unite or to disunite the interests of the individual and of the community; social (benevolence), semi-social (religion, desire of friendship or of reputation), anti-social (antipathy), personal (pleasures of sense, pecuniary interest, desire of self-preservation, love of power). The first two classes may be called "tutelary" motives, the second two "seductive" motives. To judge an action, we must look first at its effects; though a motive may raise or lower its moral quality. A tutelary motive will not justify or excuse, but may extenuate.⁵

Next Bentham considers the facility or difficulty of preventing offences, the influence thereof on alarm, and the varying circumstances of the time and place of the offence. As it is easy to guard against domestic theft, wherefore there is less alarm, the rigorous laws against it are unjustifiable; the severity of punishment prescribed gives masters a repugnance to prosecute, and thus favours impunity.⁶ On the other hand, the alarm is greater when, by the nature or the circumstances of the crime, it is more difficult to discover it or to find out its author.⁷ The amount of alarm depends also on the delinquent's character, and so the

¹ *Treatise on Legislation, Principles of the Penal Code*, chap. v.

² *Ibid.*, chap. vi.

³ Chap. vii.

⁴ Chap. iv.

⁵ Chap. viii.

⁶ Chap. ix.

⁷ Chap. x.

grounds of aggravation (i.e. the indexes of a dangerous character) are oppression of the weak, aggravation of distress, disrespect towards superiors, gratuitous cruelty, premeditation, conspiracy, falsehood, violation of confidence. Such circumstances do not necessarily justify an increase in the penalty; it may suffice to modify it conformably to the particular aggravation, so as to excite in the minds of the citizens an antipathy to the aggravating circumstance.¹ Similarly, the grounds of extenuation, lessening the alarm and admitting of a diminution in the punishment, are absence of bad intention, provocation, self-preservation, preservation of some near friend, transgressing the limit of self-defence, submission to authority or to menaces, drunkenness, childhood. In some cases, again, alarm is absent, i.e. where the only persons exposed to danger are incapable of fear. An example is infanticide, which ought not to be punished as a principal offence, and in any case the infliction of death therefor is barbarous. "It is not possible to fortify too strongly the sentiments of respect for humanity, or to inspire too much repugnance against everything that conduces to cruel habits. This offence ought, then, to be punished by branding it with disgrace. It is commonly the fear of shame which is its cause; it needs a greater shame to repress it."² Finally, the grounds of justification are consent (if there be no case of coercion, fraud, concealment, insanity, intoxication, childhood), repulsion of a greater evil (where the evil to be avoided is certain, less costly means are inapplicable, and the means employed will be efficacious), medical practice (a subdivision of the preceding), self-defence (a modification of the same), and lawful power, political or domestic.³

(ii) REMEDIES ⁴

Offences are diseases in the body politic; remedies are means of preventing or repairing them. Remedies may be divided into four classes: preventive, including direct means (aiming at a particular offence), and indirect (general precautions against a whole class of offences); suppressive (to put a stop to an offence begun but not completed); satisfactory (reparations or indemnities); penal.⁵ (Penal remedies are considered in the next section.)

¹ *Treatise on Legislation, Principles of the Penal Code*, chap. xi.

² *Ibid.*, chap. xii.

³ Chap. xiv.

⁴ This section forms Part I of *Principles of Penal Law*, in *Works*, vol. i, pp. 365 seq., and Part II in Dumont's *Traité*s.

⁵ *Treatise* (Dumont), Part³ II, chap. i.

Direct means of prevention include functions of police, assignable to all citizens or to authorised persons, magisterial supervision, discretionary powers of public officers and judges, subject to such instructions of the legislature as will render arbitrary abuses impossible. Bentham gives various maxims which should underlie these instructions, and says there is one limit which must never be passed: "Never use a preventive means of a nature to do more evil than the offence to be prevented."¹ This is a rule, obvious and indisputable; but are we sure that we, even at the present day, are faithfully observing it?

After dealing with chronic offences,² and the suppressive remedies therefor,³ Bentham condemns the execution of the Riot Act. "The magistrate is obliged to go into the midst of the tumult; he must pronounce a long drawling formula, which nobody understands. This statute, dangerous for the innocent and difficult to be executed against the guilty, is a mixture of weakness and violence. . . . In such a moment of disorder, the magistrate ought to announce his presence by some extraordinary signal. . . . The orders given should not be 'by command of the king,' but in the name of justice."⁴

Satisfaction (apart from punishment) should be made in proportion to the injury received,⁵ and should be complete in the eyes of observers, if not to the persons interested.⁶ The different kinds are: pecuniary, restitution in kind (applicable everywhere, but especially where the property possesses a peculiar value),⁷ attestative (where an evil due to spreading a falsehood is followed by publication of the truth),⁸ honorary (maintaining or re-establishing in favour of an individual a position of honour, of which the offence had deprived or threatened to deprive him), vindictive, substitutive (at the expense of a third party, responsible in his fortune for the offender, e.g. master and servant, guardian and ward, parent and child, husband and wife, etc.).⁹ In determining our choice as to the kind of satisfaction, we must consider the facility of furnishing it, the nature of the evil to be repaired, and the probable feelings of the party injured.¹⁰

To prevent a deficiency in the satisfaction, two rules should be observed. First, follow the evil of the offence in all its ramifications and among all parties to it, and proportion the

¹ *Ibid.*, chap. ii.² Chap. iii.³ Chap. iv.⁴ Chap. v.⁵ Chap. vi.⁶ Chap. vii.⁷ Chap. xii.⁸ Chap. xiii.⁹ Chap. xvii.¹⁰ Chap. viii.

satisfaction accordingly; e.g. in case of homicide, the heirs of the deceased ought to receive compensation. Secondly, in uncertain cases give the benefit of the doubt to the injured party; thus, accidents should be placed to the account of the delinquent. "Laws are everywhere very imperfect upon this point. On the side of punishments there has been little fear of excess; on the side of satisfaction, a deficiency has caused little concern. Punishment, which, if it goes beyond the limit of necessity, is a pure evil, has been scattered with a prodigal hand. Satisfaction, which is purely a good, has been dealt out with a grudging parsimony."¹ Further, in order that the satisfaction may be certain, and to avoid therefore hope of impunity, it ought not to be extinguished by the death of either the offender or the injured person.²

As to the kinds of satisfaction. Pecuniary reparation is most proper where the damage to the injured party and the advantage of the offender are alike of a pecuniary nature, e.g. in theft, speculation, extortion. It should be proportioned to the wealth of the offender and to the degree of criminality. Thus the remedy and the evil are homogeneous. Where the satisfaction and the injury have no common measure, the effect of satisfaction or punishment is precarious. "There is still in existence an English law which is a true relic of barbarous times. A daughter is considered as the servant of her father; if she is seduced, the father cannot obtain any other satisfaction than a sum of money, the price of the domestic services which he is supposed to have lost by the pregnancy of his daughter."³ In the case of honorary satisfaction, Bentham argues, amongst other things, against duelling as an inexpedient measure, but says the law has blundered in displacing it by disproportioned and inefficacious means.⁴ A large variety of remedies are suggested for offences against honour, and some of them are indeed "new" and "singular" (as he admits)—experience having shown the old ones to be inadequate. Besides simple admonition, apology of the offender, reading aloud his own sentence, a term of banishment from the injured party or from the public place where the insult was offered, the list contains such impossible remedies as kneeling before the injured party, putting on emblematical dresses and masks, for a corporal insult a retort of the same kind inflicted by the complainant, or, if he prefer it, by the hand of the executioner,

¹ *Treatise* (Dumont), Part II, chap. ix.

² Chap. x.

³ Chap. xi.

⁴ Chap. xiv.

for an insult to a woman muffling up the offender in a woman's headdress, and inflicting the retort by the hand of a woman.¹ Bentham maintains that the contempt the offender desired to fix on an innocent person ought to be transferred to himself; and he naïvely believes that public satisfactions, turned into spectacles, would furnish to the injured party such pleasures as would repair the mortification of the insult! He goes on to say that vindictive satisfaction is a pleasure, therefore a gain; it is honey gathered from the lion's carcase; it is an enjoyment to be cultivated, if restrained within the limits of the law. "It is not vengeance that is to be regarded as the most malignant and dangerous passion of the human heart; it is antipathy, it is intolerance—the hatreds of pride, of prejudice, of religion, of politics." ■ But the least excess for the sole object of vengeance must be avoided. Forgiveness of injuries is a virtue only after justice has done its work; otherwise, to forgive offences is often to invite their perpetration.³ (We may obviously take exception to some of the expressions of Bentham; but he is not obsessed by any weak sentimentality or vague, ill-directed philanthropy, and rightly demands, in addition to measures of prevention and reformation, the salutary application of retributive justice, provided useless or excessive vengeance be avoided. Once let the state surrender to the plaintive clamourings of inexperienced sentimentalists, and begin to treat deliberate, malicious criminals as though they were but naughty children or hospital patients, and as surely as night follows day the whole penal law will become a farce, and chaos and destruction will ensue.) Finally, Bentham advocates subsidiary satisfaction out of the public treasury, where the offender is without means; that is, the state is to assume the position of an insurer. But care is to be taken to avoid abuses through fraud, negligence, or collusion, and to prescribe such penalties as will not be readily incurred by a would-be offender for the sake of a doubtful gain to the person injured.⁴

(iii) PUNISHMENTS⁵

Having dealt with remedies mainly from the point of view of the persons injured, Bentham now considers penal remedies

¹ *Ibid.*, chap. xv.

² Chap. xvi.

³ *Ibid.*

⁴ Chap. xviii.

⁵ This section forms Part III of the *Treatise* (Dumont), and is Part II of *Principles of Penal Law*, in *Works*, vol. i, pp. 388 *seq.* In the *Treatise*, the first three chapters (dealing with the definition, classification, and ends of punishment) given in the *Works* are wanting.

from the point of view of the state; and so we come to punishment proper. Punishment is "an evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done or omitted."¹ Its object is to prevent the commission of like offences, whether on the part of the same offender or of others.² The great springs of human action are pleasure and pain. A would-be offender contemplating the perpetration of a certain crime will be restrained therefrom when the "value" of the pain (including the attributes of intensity, proximity, certainty, and duration), implied in the penalty imposed, appears to him to exceed the apparent value of the pleasure or good he expects to be the consequence of the act. With respect to a given individual, the repetition of an offence may be provided against by depriving him of the physical power of offending, by taking away the desire of offending (moral reformation), by making him afraid of offending (intimidation, or terror of the law).³ Physical incapacitation is the appropriate course where the crime committed by the delinquent is such as is productive of great alarm, or manifests a very mischievous disposition. Reformatory or intimidating measures are more applicable when the offence, being less dangerous, justifies only a transient punishment, and it is possible for the offender to return to society. The chief end of punishment, together with its real justification, is general prevention. If any offence that has been committed could be regarded as an isolated incident, the like of which would never recur, punishment would be useless; for it would be only adding one evil to another. Punishment should not be an act of anger, resentment, or vengeance, but an indispensable sacrifice to the common safety.⁴ (There is little more than merely apparent inconsistency between Bentham's views expressed here and those indicated above, in regard to the relationship between retributive "justice" and utility; but where, as will be seen presently, there is a conflict between these two principles, he does not hesitate to make "justice" subservient to the demands of utility.)

Cases unmeet for punishment are as follows: Where punishment is groundless, that is where there is no real offence (e.g. when consent is freely and fairly given), or where the evil is more than compensated by an attendant good (e.g. in the exercise of

¹ *Works*, vol. i, p. 390.

² *Treatise*, chap. i; *Works*, chap. iii.

³ *Ibid.*

⁴ *Works*, vol. i, p. 396.

legal authority, self-defence, etc.), or in imaginary offences due to prejudice, antipathy, the ascetic principle, etc. (e.g. heresy, witchcraft); where punishment is inefficacious, in having no power to affect the will (e.g. for acts due to ignorance, infancy, insanity, intoxication, duress); where it is needless (that is where the same end may be attained by milder means, such as instruction, example, etc.); and lastly, where it is unprofitable or too costly (that is if the evil of the punishment exceeds that of the offence, so that it would be more prudent on the ground of utility to pardon a delinquent whose punishment would cause widespread discontent, or if he is protected by a foreign state whose goodwill it is necessary to gain, or if he is able to do the nation some extraordinary service ¹). A punishment is mistaken or misapplied when it does not bear directly on the individual who is to be subjected to its influence. Such penalties are confiscation, "a remnant of barbarity which still exists throughout almost all Europe"; corruption of blood, "a cruel fiction of the lawyers to disguise the injustice of confiscation"; loss of privileges, whereby an entire corporation is penalised for the misconduct of some of its members; incapacity of illegitimate children, themselves innocent, to fulfil certain trusts and many public rights; infamy attached to the relatives of certain offenders (an injustice, however, that is passing away).²

Bentham mentions certain cases, stated above, in which the pardoning power may be exercised. Similarly, where there is a large multitude of delinquents—as after sedition, conspiracy, or public disorder—it may be well to grant them a pardon; for punishment would here do more harm than good. And, of course, a free pardon and reinstatement will be indispensable in the case of a convicted person as soon as new evidence of his innocence is discovered.³ Apart from these cases, which are based on utility and necessity, the pardoning power is out of place.⁴ It makes punishment uncertain, and therefore imparts to crime a certain element of impunity. "Clemency is the first virtue of a sovereign, if the crime be only an attack upon his self-love. But when the offence is one against society, a pardon is not an act of clemency; it is a mere piece of partiality."⁵ "Pardons without motive impeach either the laws or the government: the laws, of cruelty

¹ *Treatise*, Part III, chap. i; *Works*, Part II, bk. i, chap. iv; vol. i, p. 530.

² *Treatise*, chap. iv.

³ *Works*, vol. i, p. 530.

⁴ Cf. Beccaria's views, *supra*, on the pardoning power.

⁵ *Treatise*, Part III, chap. x.

to individuals; or the government, of cruelty to the public Reason, justice, and humanity must be wanting somewhere; for reason is never in contradiction with itself; justice cannot destroy with one hand what it has done with the other; humanity cannot require that punishment should be established for the protection of innocence, and that pardons should be granted for the encouragement of crime. . . . To sum up. If the laws are too severe, the power of pardoning is a necessary corrective; but that corrective is itself an evil. Make good laws, and there will be no need of a magic wand which has the power to annul them. If the punishment is necessary, it ought not to be remitted; if it is not necessary, the convict should not be sentenced to undergo it." ¹

With regard to the measure of punishment, or the proportion between penalties and offences, Bentham quotes Horace about making the punishment fit the crime, and observes that both Montesquieu and Beccaria insisted on the necessity of securing a due proportion, but that they merely recommended it instead of explaining in what that proportion consists. Therefore he lays down some guiding rules: (1) The evils of the punishment must be made to exceed the advantage of the offence. The repressive motive should be stronger than the seductive motive. An inefficacious punishment is a greater evil than an excess of rigour, for it is an evil wholly thrown away. (2) The less certain a punishment is the severer it should be; the greater the certainty the less the severity. It should follow the offence as closely as possible. (3) When two offences are in conjunction, the greater should receive heavier punishment, so that the offender may have a motive to stop at the lesser. (Bentham thinks it a less heinous crime to steal ten crowns than twenty, when the thief could as easily have stolen twenty.) Equal punishment for unequal offences often conduces to the commission of the greater offence. (4) The greater the offence the more reason is there to hazard a severe punishment in the hope of preventing it. It is to be remembered that the infliction of a penalty is a certain cost to procure an uncertain gain. To apply a heavy punishment for a slight offence is to pay very dearly for the chance of avoiding a small evil. (5) The same punishment for the same offence should not be inflicted on all offenders. Regard should be paid to their different sensibility. The same

¹ *Treatise*, Part III, chap. x.

nominal punishment is not the same real punishment. "Age, sex, rank, fortune, and many other circumstances ought to modify the punishments inflicted for the same offence. If the offence is a corporal injury, the same pecuniary punishment would be a trifle to the rich, and oppressive to the poor. The same punishment that would brand with ignominy a man of a certain rank would not produce even the slightest stain in case the offender belonged to an inferior class. The same imprisonment would be ruin to a man of business, death to an infirm old man, and eternal disgrace to a woman, while it would be next to nothing to an individual placed under other circumstances." "Let it be observed, however, that the proportion between punishments and offences ought not to be so mathematically followed up as to render the laws subtle, complicated, and obscure. Brevity and simplicity are a superior good. Something of exact proportion may also be sacrificed to render the punishment more striking, more fit to inspire the people with a sentiment of aversion for those vices which prepare the way for crimes." ¹

In order that a punishment may fulfil these rules of proportion, it should possess the following qualities: ■ (1) "Variability," i.e. susceptibility of adjustment to the gravity of particular offences. (2) "Equability," to make its effect the same on all guilty of the same offence, by adapting it to their particular degree of sensibility; therefore age, sex, condition, fortune, habits, and other attendant circumstances must be considered. (3) "Commensurability," i.e. where offences are connected, the greater is to receive a greater punishment. Penalties may be made commensurable by increasing the severity of a certain punishment, and by adding to a certain punishment one of a different kind. (This third quality is only an application of the first.) (4) "Characteristicalness," or analogy to the offence by which the punishment will be more easily remembered, and will more strongly impress the imagination. In this respect the *lex talionis* is admirable, but in most cases its application would be too unequable and too costly. "There are other means of analogy. Search out, for example, the motives of offences, and generally you will recognise the dominant passion of the offender, and you may punish him, according to the proverbial saying, with the instrument of his sin. Offences of cupidity will best be punished by pecuniary

¹ *Treatise*, chap. ii; *Works*, vol. i, chap. vi.

■ *Treatise*, chap. vi; *Works*, vol. i, chap. vii.

fines, when the wealth of the offender admits it; offences of insolence, by humiliation; offences of idleness, by compulsory labour." (5) "Exemplarity," so that the punishment will, in the eyes of the public, be apparent as a punishment. "The great art consists in augmenting the apparent punishment without augmenting the real punishment. . . . This may be accomplished, either in the selection of the punishments themselves, or by accompanying their execution with striking solemnities. . . . The reality of punishment is only necessary to maintain the appearance of it. . . . Take care, however, lest punishment become unpopular and odious through a false appearance of rigour." (6) "Frugality," requiring penalties to have that degree of severity essential to fulfil their object. (7) "Remissibility." "As long as testimony is susceptible of imperfection, as long as appearances may be deceitful, as long as men have no certain criterion whereby to distinguish truth from falsehood, one of the most important precautions which mutual security requires is, not to admit of punishments absolutely irreparable, except upon the clearest evidence of their necessity." (All these qualities need not necessarily co-exist in any particular penalty; they are only the circumstances to be kept in view when a punishment is chosen, for which purpose compromises will have to be made in order to secure the highest advantage. To these qualities the following may be added, which are of more or less limited utility, and are to be aimed at when it is possible to procure them without detracting from the fundamental attribute of exemplarity.) (8) "Subserviency to reformation." It is a great merit in a penalty to contribute to the criminal's reformation, not only by inspiring him with the fear of incurring punishment again, but by effecting a change in his character and habits. For this purpose we should study the motive that produced the offence, and impose a punishment which tends to weaken that motive. Thus, the different classes of prisoners in a gaol should be separated, in order that different means of treatment may be adapted to their several natures and conditions. (9) "Efficacy with respect to disablement." Mutilations and perpetual imprisonment take away the power of doing injury again; but exclusive consideration of this quality has led to excessive rigour, and to the frequent imposition and extension of the capital penalty. (10) "Subserviency to compensation," so that an indemnity may be also given to the injured party.

(11) "Popularity," or rather absence of unpopularity. A punishment should not shock the established prejudices of the public, or wound their sensibility and brave their opinion. If it does, some will aid the guilty to escape, others will refrain from laying informations, witnesses will refuse to testify; and sometimes there may be open resistance to the officers of justice, or to the execution of sentences. "When the people are on the side of the laws, the chances of escape are reduced to their lowest term."

(12) "Simplicity of description."

Next we come to the kinds of punishments.¹ No single penalty possesses all the desirable attributes. Hence it is essential to make a choice from among many penalties, to vary them, and to combine them. Medicine, like penal jurisprudence, offers no panacea. Different means must be resorted to, according to the nature of disorders and the temperament of the patient. Various divisions of punishments are possible. The following classification, which is more a practical than a logical one, may be given: (1) Capital; (2) afflictive — corporal inflictions of temporary effect, e.g. whipping, fasting, etc.; (3) indelible—of permanent bodily effect, e.g. branding, amputation; (4) ignominious—exposing the offender to the contempt of spectators; (5) penitential—awakening shame and exposing to some censure, though not to infamy; (6) chronic, e.g. banishment, imprisonment; (7) simply restrictive, e.g. prohibiting the exercise of a certain profession, or the frequenting of a certain place, etc.; (8) simply compulsive—obliging a man to do something from which he would wish to be exempted, e.g. to present himself at certain times before an officer of justice; (9) pecuniary; (10) quasi-pecuniary—depriving the offender of a kind of property in the services of individuals; (11) characteristic—certain additions to any of the preceding, so as to impress the imagination, by some analogy, with a lively idea of the offence; thus if a counterfeiter is condemned to be branded, the word "counterfeiter" may be branded on his forehead, an impress of coin made on his cheeks, etc. Similarly the prisoners in a gaol may be made to wear dresses or other external marks emblematical of their respective crimes. All these classes of punishments may be also divided according as they affect the person, the property, the reputation, and the condition of delinquents; or they may be reduced to corporal punishments and privative punishments (those involving loss or forfeiture).²

¹ *Treatise* (Dumont), chap. vii.

² *Works*, vol. i, Part II, bk. i, chap. ii.

A large variety of penalties is indeed indispensable to a sound penal system. To use but one or two kinds "is an effect of ignorance of principles and of a barbarous contempt of proportion." Punishments have often been ill-chosen and misapplied; and legislators have attempted to make up by severity what was wanting in justice. But if severity is not necessary and justifiable, it is merely gratuitous, misdirected, barbarous cruelty.¹

Some common punishments are now examined.² The "afflictive" penalties are not suitable for all offences, because they cannot be applied in a slight degree. "The legislator who orders whipping knows not what he does; the judge is nearly as ignorant." "Indelible" punishments might well be abolished altogether; if used at all, they should be confined to very rare offences, where the principle of analogy may be introduced, and to dangerous offenders. But the mark should, in any case, be imprinted by coloured powders, and not with a hot iron. Among ignominious punishments, "infamy is one of the most salutary ingredients in penal pharmacy"; and to proportion it to the offence, a new apparatus of justice will have to be devised, e.g. inscriptions, emblems, dresses, pictorial representations, etc., taking care "to concentrate public indignation on the offender and the offence, not on the laws and the judges," and making the law aim "rather to impress a great lesson than to satisfy a spirit of vengeance." The pillory is of all punishments "the most unequal and unmanageable." "The delinquent is abandoned to the caprice of individuals, and this singular infliction is sometimes a triumph, and sometimes it is death." Bentham relates that on one occasion when an author was put in the pillory "for what is called a libel," the platform was turned into a "kind of lyceum," the whole time being passed in compliments between him and the spectators. On the other hand "a man condemned to the same punishment for a lascivious offence, was murdered by the populace under the eyes of the police, who did not even attempt to defend him." Bentham refers to Burke's denunciation of this abuse, and says "the orator was applauded but the abuse remains."

As to the class of "chronic" punishments, Bentham points out that banishment has an unequal effect; for various circumstances must be taken into account, such as the offender's age, sex, family, ties, etc. But local banishment, as a "simply restrictive" punishment, i.e. banishment from the presence of

¹ Cf. *Treatise*, chap. viii.

² *Ibid.*, chap. ix.

the injured party, may be advantageous in the case of offences due to the hostility between certain individuals, and from which the public in general has nothing to fear.¹

Transportation² has all the defects a punishment can have, and none of the qualities it ought to have. Under the old system of transportation to America, bondage was added to banishment; but the convict, who was able to offer the contractor a larger sum than would be given by an American planter for his prospective services during the term, could procure his liberty at the first port of call. Thus, practically, "the individual was punished with bondage rather for his poverty than for the crime he had committed." So that "the most culpable—those who had committed great crimes and who had contrived to secure the profits of their crimes—were least punished." Further, there were too many facilities for return; and many convicts, before the expiration of their term, came back more hardened criminals. Under the later system of transportation to Botany Bay, the great distance of the place of banishment minimised illegal returns, but it was also an insuperable barrier against most of those who had served their term. As transportation, says Bentham, is a complex punishment, involving banishment, which is a defective measure for the reasons already mentioned, and hard labour which, salutary in itself, produces, in the peculiar circumstances, no beneficial effects, the undesirability of the system is obvious. Tested by the essential objects of penal justice, it fails in every way. Thus, the quality of exemplarity is absent; little or no impression is made on the people of the mother country, many of whom, indeed, through pleasing illusions and agreeable anticipations of the experience are actually encouraged to commit offences in order to be sent out. There is little possibility of reformation. The convicts have no proper supervision; vicious practices obtain, vicious habits are made worse or newly engendered—"sloth, gaming, drunkenness, incontinence, profaneness, quarrelling, improvidence, and the absence of all honourable feeling." Conspiracies are hatched, heinous crimes committed, and wanton acts of barbarity perpetrated against the natives. Again, the penalty does not possess the attribute of incapacitation; for the legislature has merely assigned another locality to the delinquent, who is not necessarily disabled criminally.

¹ *Treatise*, chap. ix.

² *Works*, vol. i, pp. 490-497. See also *supra*, chap. ii, *in fin.*

Further, the system lacks the quality of compensation to the party injured, and, moreover, is wanting in economy. Finally, in practice, transportation works much greater havoc than the legislature intended. "The punishment of transportation, which, according to the intention of the legislator, is designed as a comparatively lenient punishment, and is rarely directed to exceed a term of from seven to fourteen years, under the system is, in point of fact, frequently converted into capital punishment. What is more to be lamented is that this monstrous aggravation will, in general, be found to fall almost exclusively upon the least robust and least noxious class of offenders—those who, by their sensibility, former habits of life, sex, and age, are least able to contend against the terrible visitation to which they are exposed during the course of a long and perilous voyage." Food is scanty and bad, disorder and disease abound. "Justice, of which the most sacred attributes are certainty and precision—which ought to weigh with the most scrupulous nicety the evils which it distributes—becomes, under the system in question, a sort of lottery, the pains of which fall into the hands of those that are least deserving of them. Translate this complication of chances, and see what the result will be: 'I sentence you,' says the judge, 'but to what I know not—perhaps to storm and shipwreck, perhaps to infectious disorders, perhaps to famine, perhaps to be massacred by savages, perhaps to be devoured by wild beasts. Away, take your chance, perish or prosper, suffer or enjoy; I rid myself of the sight of you; the ship that bears you away saves me from witnessing your sufferings; I shall give myself no more trouble about you.'"¹ Bentham concludes by replying to those who had spoken of colonisation as an advantage of the system: "Of all the expedients that could have been devised for founding a new colony, the most expensive and the most hopeless was the sending out, as the embryo stock, a set of men of stigmatised character and dissolute habits of life."²

With regard to prisons and the conditions of imprisonment, Bentham's views may be gathered, in the first place, from his vigorous criticism of the prevailing state of things,³ and secondly from his constructive scheme, the Panopticon, which has already been referred to. "Prisons," he observes, "with the exception of a small number, include every imaginable means of infecting both body and mind. Consider merely the state of forced idleness

¹ *Works*, vol. i, p. 497.

² *Ibid.*

³ Cf. also *supra*, chap. ii, sect. ii, *in fin.*

to which the prisoners are reduced, and the punishment is excessively expensive. Want of exercise enervates and enfeebles their faculties, and deprives their organs of suppleness and elasticity; despoiled, at the same time, of their characters and of their habits of labour, they are no sooner out of prison than starvation drives them to commit offences. Subject to the subaltern despotism of men who for the most part are depraved by the constant spectacle of crime and the habit of tyranny, these wretches may be delivered up to a thousand unknown sufferings, which aggravate them against society, and which harden them to the sense of punishment. In a moral point of view, an ordinary prison is a school in which wickedness is taught by surer means than can ever be employed for the inculcation of virtue. Weariness, revenge, and want preside over these academies of crime. All the inmates raise themselves to the level of the worst; the most ferocious inspires the others with his ferocity; the most cunning teaches his cunning to all the rest; the most debauched inculcates his licentiousness. All possible defilements of the heart and the imagination become the solace of their despair. United by a common interest, they assist each other in throwing off the yoke of shame. Upon the ruins of social honour is built a new honour, composed of falsehood, fearlessness under disgrace, forgetfulness of the future, and hostility to mankind; and thus it is that unfortunates, who might have been restored to virtue and to happiness, reach the heroic point of wickedness, the sublimity of crime."

"A convict, after having finished his term of imprisonment, ought not to be restored to society without precautions and without trial. Suddenly to transfer him from a state of surveillance and captivity to unlimited freedom, to abandon him to all the temptations of isolation and want, and to desires pricked on by long privation, is a piece of carelessness and inhumanity which ought at length to attract the attention of legislators. In London, when the hulks on the Thames are emptied, the malefactors at that jubilee of crime rush into the city like wolves, which after a long fast have succeeded in entering a sheep-fold; and until all these plunderers have been apprehended for new offences, there is no security upon the highways, no safety in the streets of the metropolis." ¹

"English law-makers have not yet adopted imprisonment

¹ *Treatise*, chap. ix.

joined to labour—a sort of punishment good in so many respects. Instead of a compulsive occupation, they reduce their prisoners to complete idleness. Is this by design? No, it is doubtless by habit. Things have been found upon that footing; it has been disapproved, but has not been changed. Pecuniary advances, vigilance, and sustained attention are needed to combine imprisonment with labour; none of these is needed to shut up a man, and leave him to himself.”¹

A more rational and more beneficial system of incarceration Bentham tried to introduce by means of his scheme of the Panopticon penitentiary.² It has already been pointed out that its organisation depended on three essential points; first, the construction of a circular or polygonal building, having cells on each story of the circumference, all visible from the governor's lodge in the centre; secondly, management by contract, so that the contractor, taking the profits of the prisoners' labour, would identify his interest with his duty; and thirdly, responsibility and magisterial supervision of the manager, who would be bound to insure the lives and safe custody of those entrusted to him. A prison of this kind, held Bentham, would fulfil the essential aims of punishment. It would be exemplary; placed in the neighbourhood of the metropolis, it would be a visible reminder to all. “The appearance of the building, the singularity of its shape, the walls and ditches by which it would be surrounded, the guards stationed at its gate, would all excite ideas of restraint and punishment. . . . The public would be allowed to contrast the labour of the free man and that of a prisoner, . . . the enjoyments of the innocent and the privations of the criminal. . . . At the same time the *real* punishment would be less than the apparent.” It would be reformatory. Idleness, intemperance, vicious connexions would be impossible. By his constant superintendence the governor would subject the inmates to a new discipline, by his teaching them profitable trades he would impart a new education to them, so that when set free they would be able to take up a useful occupation; for “indigence and ignorance are the parents of crime.” Labour, “the only resource against ennui,” would be followed by immediate reward; and the profit-sharing would deprive it of the character of servitude. Suitable rewards for efficiency, diligence, orderly conduct might excite

¹ *Treatise*, chap. ix, *in fin.*

² See Part II, bk. v, chap. iii, of *Principles of Penal Law*, in *Works*,¹ vol. i. pp. 498–503; cf. *supra*, chap. i, *sub ann.* 1791–1792.

healthful emulation, and help to form and maintain good habits. To treat the prisoners as human workers, and not as wild beasts in captivity, would do much to create in them a feeling of self-respect and honour. To avoid fatal contagion, there would be a separation into classes. Religious services would be made attractive, in order that they might prove more efficacious. Further, this kind of imprisonment would take away from the prisoners the power to injure. After their liberation, they will have acquired some pecuniary and industrial resources. Auxiliary establishments could therefore be set up, into which the discharged prisoners might be admitted and allowed to remain, for a longer or shorter period, according to the nature of their crimes and their previous conduct. "In this privileged asylum they would have different degrees of liberty, a choice of their occupations, the entire profit of their labour, with fixed and moderate charges for their board and lodging, and the right of going and returning, on leaving a certain sum as security; they would wear no prisoner's uniform, no humiliating badge. This transient sojourn, this noviciate, would serve to conduct them by degrees to their entire liberty; it would be an intermediate state between captivity and independence, and afford a proof of the sincerity of their amendment." Again, by this system compensation could be provided for the party injured. Economy, also, would be secured; for, by Bentham's calculation, it would cost the state about £13 10s. per head yearly, whilst transportation to New South Wales cost £37 per head. In conclusion, he emphasises the advantages of the scheme, which are in marked contrast to the great inconveniences and evils of colonial transportation. "There is no prolonged sojourn in the hulks, none of the dangers of a long sea-voyage, no promiscuous intercourse of prisoners, no contagious sickness, no danger of famine, no warfare with the savage natives, no rebellions, no abuse of power by the persons in authority." The use of punishment would be greatly economised. "It will no longer be dissipated and lost upon barren rocks, and amid distant deserts; it will always preserve the nature of legal punishment, of just and merited suffering, without being converted into evils of every description, which excite only pity. The whole of it will be seen; it will all be useful; it will not depend upon chance; its execution will not be abandoned to subordinate and mercenary bands; the legislator who appoints it may incessantly watch over its administration."

Now Bentham comes to the more difficult question of capital punishment. In many countries of the world it has been entirely abolished (we have already seen the great influence of Beccaria in this respect), in others it has fallen into disuse. In our own country it remains; but the proportion of executions to death sentences is small. Moreover, the number of people advocating its total suppression is considerable. As this subject is of particular interest to many, Bentham's treatment of it ¹ will be given with some fullness, especially so as it transcends in thoroughness, cogency, and breadth of view that of his distinguished predecessor Beccaria, and indeed that of other forerunners and contemporaries.

Should the death penalty be abrogated? To solve this momentous question, Bentham in his practical and judicial manner has recourse to the above-mentioned qualities, which should characterise a "lot" of punishment. Now the capital penalty has certain advantageous properties.² It deprives the offender of the power of doing further injury, so that the community is quickly and entirely delivered of all the alarm caused and that may be again caused by him. As to the principle of analogy, it applies of course only to the case of murder. It possesses the attribute of exemplarity; Bentham holds, as against Beccaria, that for the generality of men, attached as they are to life by the ties of reputation, affection, enjoyment, hope, it is more exemplary than any other penalty. The suffering is momentary.

On the other hand, many of the desirable qualities of punishment are wanting in the death penalty. It is not compensatory. It is not frugal, for it produces a certain loss to society, as regards both wealth and strength. The majority of delinquents, however, have lost all habits of regular industry, and are the drones of the hive; so that for them death might be an eligible mode of punishment, were it not for the existence of a preferable one in the case of imprisonment and hard labour, "by which there is a chance of their being reformed and rendered of some use to society." It is deficient in variability, as it exists only in one degree; and also in equability, for it cannot be made to correspond to the different measures of offenders' sensibility, and therefore

¹ *Works*, vol. i, pp. 444-451; *Treatise* (Ed. Dumont), chaps. ix, xxii; *Jeremy Bentham to his Fellow-Citizens of France*, in *Works*, vol. i, pp. 525-532. (All these are here considered together, as their arguments overlap and are more or less repeated.)

² *Works*, vol. i, p. 444.

its effect cannot be made the same on all guilty of the same crime. In other words, death, whilst removing all pleasures, may also, in certain cases, take away all pains; and for this reason it might well seem desirable. It is not only irremissible—which applies also to other kinds of afflictive punishments—but also irreparable; the life of a man may be made to depend on slight, precarious circumstances, on inadequate, mistaken, or false testimony. It is (for crimes other than murder) unpopular, and becomes more and more so every day, as men become enlightened, and their manners more softened. This unpopularity of the penalty means its signal inefficiency; for the persons whose co-operation is necessary to convict the accused are reluctant “to perform their respective parts in the melancholy drama”—the party injured refrains from prosecuting the offender, the public favours his escape, witnesses withhold their evidence or weaken its effect, judge and jury “allow of a merciful prevarication” in his favour. Indeed, to prevent the execution of the law, there is sometimes a deliberate subornation of perjury. Bentham gives the following epitomised example (numerous actual cases are on record, some of which Romilly mentioned in the House of Commons ¹): “Case of prosecution for theft. Subject-matter, 39 pieces of gold; value £39 sterling. Judge’s charge: ‘Gentlemen of the jury, find the value 39 shillings.’” Another example is given to indicate the attitude of the jury, apart from the judge’s direction. “‘Observe that juryman in a blue coat,’ said one of the judges at the Old Bailey to Judge Nares, ‘do you see him?’ ‘Yes.’ ‘Well, there will be no conviction of death to-day.’ And the observation was confirmed by the fact.” ² The capital penalty prescribed by the law is thus perjuriously averted. It makes perjury appear meritorious, by founding it on humanity; it renders convictions arbitrary, as the public functionaries substitute their own capricious will for the express will of the legislator; it makes pardons necessary, and the evil effects of undue pardon are enormously enhanced; the procedure engenders a contempt for the laws, by making it notorious that they are not executed. Accordingly, there arises on the part of the delinquents or would-be delinquents “a comparative insensibility to the danger of punishment in this shape”; and the consequent impunity leads to an increase in crime. All these considerations,

¹ See *infra*, as to Romilly’s bills in parliament, chaps. i, ii.

² *Works*, vol. i, p. 451.

then, irresistibly co-operate to show that the capital penalty should be abolished. Its inefficiency and needlessness are actually demonstrated, says Bentham, by the experiment of Leopold, Grand Duke of Tuscany; after the suppression of the penalty in that country it was found that the number of gross crimes had diminished.¹

Apart from the fact that these serious deficiencies preponderate decisively, it may be said further that the advantages enumerated above do not constitute adequate reasons for continuing capital punishment. "Analogy is a good recommendation, but not a good justification; even in case of murder other punishments may be devised, the analogy of which will be sufficiently striking." Even the alleged popularity of punishment for homicide would vanish, if other kinds of penalties were tried and found efficacious. Again, the claim of necessity is exaggerated, in regard to disabling or preventing a delinquent from doing further mischief. For madmen are still more dangerous, and more difficult to manage, and yet no one deems it essential that they should be put to death, rather than be kept in confinement. In certain circumstances, however, as, for example, in rebellion (in which case Bentham follows Beccaria²), the infliction of death, say on the leader, may be justified, when by doing so the faction itself would be put down. Finally, the attribute of exemplarity furnishes the strongest reason in its favour; but even then it lacks operative force with respect to the greatest and most hardened criminals, so that a more effective substitute needs to be established. "... the contemplation of perpetual imprisonment, accompanied with hard labour and occasional solitary confinement, would produce a deeper impression on the minds of persons, in whom it is more eminently desirable that the impression should be produced, than death itself."³ "It shows a total want of judgment and reflection in legislation to apply it to a degraded and wretched class of men, who do not set the same value upon life, to whom indigence and hard labour are more formidable than death, and the habitual infamy of whose lives renders them insensible to the infamy of the punishment."⁴ It cannot be too strongly emphasised that death is not the only punishment that can outweigh certain temptations to commit

¹ Cf. *supra*, on Beccaria, chap. iv.

² *Dei Delitti*, chap. xvi. See *supra*, on Beccaria, chap. iii, sect. iv.

³ *Works*, vol. i, p. 450.

⁴ *Ibid.*

homicide. "These temptations can only arise from hostility or cupidity; and do not these passions, from their very nature, dread humiliation, want, and captivity more than death?"¹

"Whence originated," asks Bentham, "the prodigal fury with which the punishment of death has been inflicted? It is the effect of resentment which at first inclines to the greatest rigour; and of an imbecility of soul, which finds in the rapid destruction of convicts the great advantage of having no further occasion to concern oneself about them. Death! always death! It requires neither the meditations of genius, nor resistance to the passions. It is only to yield oneself to them, and we are carried at once to that fatal term. . . . The proportion [between offences and punishments] is continually outraged or forgotten, and the punishment of death is lavished upon the most trifling offences."²

"The policy of a legislator who punishes every offence with death is like the pusillanimous terror of a child who crushes the insect he does not dare to look at. . . . Be slow to believe in death. By disusing it as a punishment you will prevent it as a crime; for when men are placed between two offences it is desirable to give them a sensible interest not to commit the greater. It is desirable to convert the assassin into a thief, and to give him a reason for preferring a reparable to an irreparable offence."³

"The mildness of the national character is in contradiction to the laws, and, as might be expected, it is that which triumphs; the laws are eluded; pardons are multiplied; offences are overlooked; testimony is excluded, and juries, to avoid an excess of severity, often fall into excess of indulgence. Thence results a system of penal law, incoherent, contradictory, uniting violence to weakness, dependent on the humour of a judge, varying from circuit to circuit, sometimes sanguinary, sometimes null."⁴

(iv) INDIRECT MEANS OF PREVENTING OFFENCES⁵

In "direct legislation" offences are combated by specifically prohibiting them under pain of prescribed penalties; in "indirect legislation" they are combated by preventive means. "By direct legislation the evil is attacked in front. Indirect legislation attacks it obliquely. In the first case, the legislator declares open

¹ *Treatise*, chap. ix.

² *Ibid.*

³ Chap. xxii.

⁴ Chap. ix.

⁵ *Treatise, Principles of a Penal Code*, Part IV; *Works (Principles of Penal Law, Part III)*, vol. i, pp. 533 seq.

war against the enemy, points him out, pursues him, meets him foot to foot, and carries his defences sword in hand. In the second case, he does not announce his whole design; he works underground, he procures intelligence, he seeks to prevent hostile enterprises, and to keep still in his alliance those who may have formed secret intentions against him.”¹ Bentham observes that the second kind of legislation has never been thoroughly examined.

In the case of direct legislation, the legislator should specify the acts that are to be deemed offences, describe each offence, state why those acts are to be so regarded—the reason being based only on the principle of utility—assign a competent punishment for each offence, and state why such punishment is justifiable. But every penal system is intrinsically defective. It presupposes the existence of evil, and awaits its occurrence. “Every new instance of punishment inflicted is an additional proof that punishment lacks efficacy, and leaves behind it a certain degree of danger and alarm.”² Punishment itself is an evil, though necessary to prevent greater evils. Many injurious acts evade the operation of penal justice. Therefore, to make up for the imperfection of the criminal law, other expedients are necessary for the prevention of offences, either by making it impossible to acquire the *knowledge* needed for their commission, or by taking away the *power* or the *will* to commit them. These indirect means are milder measures, not possessing the character of punishments; they act upon man physically or morally, and succeed in many cases in which direct means will not answer.

The influence of the law, then, will be directed to restrain *power*: thus, the power to do harm may be removed by excluding the subjects, the instruments of offence, e.g. prohibiting the sale and manufacture of tools for making false coin, poisons, arms easy to be concealed, instruments of forbidden games, certain nets and traps for wild game, etc.—wherein the part of the legislator is comparable to that of a nurse keeping dangerous articles from the hands of children. To the same class belong the licensing laws, the provisions for destroying libellous productions, seditious writings, obscene figures in the streets, for preventing the printing and publication of works considered pernicious, for limiting the purchase and storage of gunpowder, etc.³

To prohibit the acquisition of knowledge that may be turned to a bad purpose is to be condemned. It is a policy that has

¹ *Treatise*, Introduction.

² *Ibid.*

³ *Ibid.*, Part IV, chap. i.

produced the censorship of the press, the inquisition, etc., and it ever tends to brutalise mankind. The offences of refinement are less injurious than those of ignorance; and the best way to combat the evil that may result from a little knowledge is to increase the knowledge. The evil of an offence—the only object regarded by the principle of utility—does not depend merely on knowledge and depravity of character, but chiefly on the consequences produced, viz. the sufferings of the injured and the alarm excited in the community. The depravity of the culprit is not an essential circumstance, but merely an aggravation. Indeed the smallest degree of knowledge suffices for the greatest offences, such as homicide, arson, robbery, larceny. “The dissemination of knowledge has not increased the number of offences, not even the facility of committing them; it has only diversified the means of their perpetration. And how? By gradually substituting less injurious means for those which are most injurious. The true censorship is that of an enlightened public, which discountenances false and dangerous opinions, and encourages useful discoveries. In a free country the audacity of a libel does not save it from general contempt; in this respect, the indulgence of the public is always in proportion to the rigour of the government.”¹

The indirect means of legislation can be more usefully employed to influence the inclination of men, to end the discord between the will and the understanding—a conflict aptly expressed by the Latin poet:

“Video meliora proboque,
Deteriora sequor”—²

and to lessen the contrariety among motives, which is often due to lack of skill in the legislator, “to an opposition which he has himself created between the natural sanction and the political sanction, between the moral sanction and the religious sanction.” Such indirect means are the following:

- “1. To change the course of dangerous desires, and direct the inclinations towards amusements conformable to the public interest.
2. To arrange so that a given desire may be satisfied without injury, or with the least possible injury.
3. To avoid furnishing encouragements to crime.

¹ *Ibid.*, chap. ii.

² Ovid, *Metam.* vii, 20, 21.

4. To increase responsibility in proportion as temptation increases.
5. To diminish the sensibility to temptation.
6. To strengthen the impression of punishments upon the imagination.
7. To facilitate knowledge of the fact of an offence.
8. To prevent an offence by giving to many persons an immediate interest to prevent it.
9. To facilitate the means of recognising and finding individuals.
10. To increase the difficulty of escape.
11. To diminish the uncertainty of prosecutions and punishments.
12. To prohibit accessory offences, in order to prevent the principal offence." ¹

In addition to these means whose object is special, there are others of a more general kind, as, for example, "the culture of honour, the employment of the impulse of religion, and the use to be made of the power of instruction and of education." ²

First, as to changing the course of dangerous desires.³ Now the aim of indirect legislation is to counteract the influence of pernicious desires, by strengthening others capable of entering into rivalry with them. Such pernicious desires appertain to the malevolent passions, the appetite for strong drinks, idleness. Accordingly, the means of weakening these desires are—to encourage honest inclinations, to favour the consumption of non-intoxicating beverages, to avoid forcing men into idleness. "The seeds of good and the seeds of evil are inseparably mixed." No passion is absolutely bad; none (except the passion for inebriating liquors) need be entirely eradicated, for they may at times be diverted to useful purposes, e.g. anger, to repel an enemy; but each one needs guidance. A useful balance may be established between the various inclinations, by strengthening the too weak ones, and weakening the too strong. The promotion of innocent amusements, apart from giving pleasure, will tend to weaken the dangerous inclinations. Such amusements are derived from the following sources, in ascending order of refinement: eating—introduction of a large variety of aliments, encouraging the art of gardening for producing nutritious vegetables; drinking—introducing non-intoxicants, of which tea and

¹ *Treatise*, Part IV, chap. iii.

² *Ibid.*

³ Chap. iv.

coffee are the chief; improvements in everything constituting elegance—dress, furniture, parks, gardens; encouraging pastimes and games (except games of hazard); music, theatres, assemblies, public amusements; art, literature, science. (Here Bentham is decidedly in favour of Sunday amusements.) “The rigid observance of Sunday is a violation of this policy. The Act of Parliament upon this subject, passed in 1781, seems more appropriate to the times of Cromwell than our own. It prohibits people from every kind of Sunday amusement, except sensual pleasures, drunkenness, and debauchery. Sunday becomes by this kind of rigour an institution in honour of idleness, and profitable to all the vices. . . . If a revealed law is in contradiction to morality, it ought not to be listened to. (But this contradiction does not exist, for this rigorous observance of Sunday has no foundation in the Gospel. . . . However good the intention may be, it is certain that the tendency of this ascetic practice is hurtful and immoral. (Religions which inspire gloom, governments which render men distrustful, and which keep them apart, contain the germ of the greatest vices and the most injurious passions.”)¹

Provision should be made for the satisfaction of certain imperious desires, without producing any injury, or with the least possible injury. Thus the “vindictive appetite” may be satisfied—and minimised—by offering adequate legal redress for personal injury, and especially for injuries affecting reputation and honour. Failing this, some indulgence will have to be shown to duelling, if poisoning and assassinations are to be avoided. “English jurisprudence is eminently defective upon this point. It does not recognise the existence of such a thing as honour. It has no means of measuring a corporal insult, except by dimensions of the wound. It considers money as the remedy for all evils, the palliative for all affronts, the equivalent for all insults.”² Again, in case of indigence, the desire to produce the means of subsistence may lead to the commission of offences, the threat of punishment availing but little. The only remedy is protection against extreme want. For this purpose the indigent should be divided into separate classes—the industrious poor, idle mendicants, suspected persons unable to find employment, liberated convicts—and treated according to their merits. Thirdly, in regard to the sexual passion, the legislator ought to facilitate marriage, and to authorise divorce under suitable

¹ *Ibid.*² Chap. v.

restrictions. Where marriages are indissoluble, mere separations may lead to great evil.

Encouragement to crime might be diminished by laying down provisions against the unauthorised detention of property, to the effect that such detention shall not be profitable to the detainer, provisions making it unprofitable to the assured to destroy the property insured, provisions against secret commissions, bribes, etc.¹

In public and other employments, temptation may be lessened by the payment of adequate salaries. "Persons employed in the public service should be above the pressure of want, especially in all those employments which afford an opportunity of acquisition by injurious means." ■

As to strengthening the impression of punishment on the imagination, Bentham says: "It is the real punishment that does all the evil; it is the apparent punishment that does all the good." Hence we should decrease the former, and increase the latter. "Render your punishments exemplary; give to the attendant ceremonies a sort of mournful pomp." "The methods of punishment which prevail in England form a perfect contrast to everything that can inspire respect. A capital execution has no solemnity; the pillory is sometimes a scene of buffoonery, sometimes an exhibition of popular cruelty, a game of chance, in which the sufferer is exposed to the caprices of the multitude, and the accidents of the moment. The severity of a public whipping depends on the money given to the executioner; branding in the hand, according to the understanding between the convict and the officer, is sometimes inflicted with a cold iron and sometimes with a hot one; if it be done with a hot iron, the branding is often confined to a slice of bacon interposed between the branding-iron and the criminal's skin. To keep up the farce, while the meat is smoking and burning, the supposed sufferer puts forth loud cries of agony and pain. The spectators who understand the whole game only laugh at this parody on the law."³

In order to facilitate knowledge of the fact of an offence we should require proofs of title to be in writing, attest title deeds, register them, register events on which titles depend, e.g. births, deaths, marriages; we should put people on their guard against offences "by furnishing instructions relative to poisons, false weights and measures, impostures of mendicants, theft, pilfering,

¹ *Treatise*, chap. vi.

■ Chap. viii.

³ *Ibid.*

methods of obtaining by false pretences, religious impostures"; publish tables of prices as a check to mercantile extortion and exorbitant interest; publish official fees and audited accounts in which the nation is interested; establish uniform weights and measures, standards of quality, brands or marks attesting the quality or quantity of articles, all being made known and subject to the supervision of inspectors.¹

The means of recognising and finding individuals may be facilitated by appropriate police provisions. Registers of the population should be kept, containing the names of all persons, dwelling, age, sex, profession or occupation, whether married or not. Magistrates should be entitled to demand an account from every suspected person of his means of livelihood. But two things must be observed in regard to such regulations. First, the national spirit should not thereby be shocked; secondly, "the rules of police ought not to be so minute and particular as to expose the citizens frequently to break them, nor should they be rendered vexatious by imposing numerous and troublesome restraints. Precautions necessary at certain times of danger and trouble, ought not to be prolonged into a season of quiet, as the regimen proper for sickness ought not to be kept up after the health is restored."²

The uncertainty of prosecutions and punishments may be lessened by establishing such rules of evidence and forms of procedure as will exclude every false information, that is "everything which is more likely to mislead than to enlighten"; by taking precautions against the partiality and corruption of judges; avoiding delays; simplifying the system of procedure; reducing the taxes on legal proceedings; appointing a public prosecutor.³

(In order to prevent the principal offence, accessory offences and preparatory acts ought to be defined and forbidden—e.g. to carry arms that are easily concealed, to traffic without restriction in poisons, etc. "It is thus that a vigilant legislator, like a skilful general, takes care to reconnoitre all the exterior posts of the enemy, in order to interrupt his enterprises." Bentham divides accessory offences into four classes, and in reference thereto he lays down three rules by way of reminder to the legislator: "(1) Whenever a principal offence is created, all preparatory acts and simple attempts ought also to be prohibited, ordinarily under a less penalty than the principal offence; (2) to

¹ *Ibid.*, chap. x.

² Chap. xii.

³ Chap. xiv.

the description of the principal offence there ought to be appended a description of all accessory, preliminary, and concomitant offences which are susceptible of a specific description; (3) in the description of these accessory offences, care must be taken not to impose too many restraints, not to entrench too far upon individual liberty, not to expose innocence to danger by conclusions too precipitate.”¹

Further, the legislator should aim at the cultivation of benevolence. He can give a new form to this sentiment by prescribing mild laws, for “sanguinary laws have a tendency to render men cruel, by fear, by imitation, and by fostering a spirit of revenge”; by helping to remove such prejudices as make men enemies; by forbidding everything that serves to incite to cruelty, especially every form of cruelty to animals, whether by way of amusement or to gratify gluttony. “To my apprehension every act by which, without prospect of preponderant good, pain is knowingly and willingly produced *in any being whatsoever*, is an act of cruelty; and like other bad habits, the more the correspondent habit is indulged in, the stronger it grows, and the more frequently productive of bad fruits.”² “A time will come when humanity will spread its mantle over everything that breathes. The lot of slaves has begun to excite pity; we shall end by softening the lot of the animals which labour for us and supply our wants.”³ But the application of the sentiment of benevolence ought to be regulated according to the dictates of utility. “Command and force do not avail. Men must be persuaded, enlightened, taught little by little, to distinguish the different degrees of utility, and to proportion their benevolence to the extent of its object. Men should be taught to blush at that spirit of family, at that spirit of caste, at that spirit of party, sect or profession, which militates against the love of country; and at that unjust patriotism which glories in the hatred of other nations. They should be dissuaded from assuming, through a misplaced pity, the advocacy of deserters, smugglers, and other delinquents who sin against the state. They should be disabused of that false notion that there is any humanity in favouring the escape of a criminal, in lending impunity to crime, in encouraging mendicity to the prejudice of industry.”⁴

¹ *Treatise*, chap. xv.

² “On shooting,” etc., Letter to the *Morning Chronicle*, March 4, 1825; in *Works*, vol. x, p. 550.

³ *Treatise*, chap. xvi.

⁴ *Ibid.*

The motive of honour, or the popular sanction, should be fortified, and its application regulated. The force of public opinion depends on its extent and its intensity. The former element is promoted by securing liberty of the press, publicity of tribunals and proceedings (unless secrecy be required for a special reason) and of accounts; the latter, by instituting ignominious punishments and awards of honour. "There is an art of guiding opinion, without the public suspecting how it is led. It consists in arranging things so that the act which you wish to prevent cannot be performed without doing something else, which popular opinion condemns already."¹

Advantage may also be taken of the motive of religion. "The tendency of religion ought to be conformable to the plan of utility. As a sanction it is composed of punishments and rewards. Its punishments ought to be attached to those acts which are injurious to society, and to such acts alone. Its rewards ought to be promised to acts the tendency of which is advantageous to society, and to no other acts. . . . The only means to judge of its tendency is to consider it solely in its relation to the good of political society. Every other part of it is indifferent, and whatever is indifferent in religious belief is liable to become pernicious."²

Again, the power of education ought not to be neglected. "The legislator ought to pay particular attention to youth, that season of lively and durable impressions, in order to direct the course of the inclinations towards those tastes most conformable to the public interest."³

Next, Bentham mentions various general precautions against abuses of authority. Some of these have already been set forth, e.g. the prohibition of all arbitrary proceedings, the exercise of power according to prescribed rules and forms, the freedom of the press. Others are as follows: division of power into different branches, and each branch among several co-participators, putting the power of appointment and of removal into different hands, not permitting governors to remain a long time in the same districts, renewal of the governing bodies by rotation, receiving secret information, right of petitioning the supreme authority, right of association, that is meetings of citizens for expressing their views on public measures.⁴

Finally, the bad effect of offences may be diminished by

¹ *Ibid.*, chap. xvii.

² Chap. xviii.

³ Chap. xx.

⁴ Chap. xxi.

reducing the evil produced, as far as possible, to a kind that can be "cured" by a pecuniary compensation, and throwing the expense of this "cure" on the authors of the evil, or, in their default, on the public. Crimes are due to three principal causes—incontinence, hatred, and rapacity. Pecuniary reparation is scarcely applicable to those resulting from the first two; but crimes involving them diminish with the progress of civilisation. Rapacity, however, is a fruitful source of offences. "Be indulgent to this passion so long as it confines itself to the use of peaceable means; but be careful to deprive it of all its unlawful gains. Grow severe towards it in proportion as it breaks out in overt acts, and has recourse to menace and to violence. But still reserve means for further severity in case it is guilty of such atrocities as arson and murder. It is in the skilful gradation of these preventive means that the penal art consists."¹

"The science of which the basis has been investigated in this work can be pleasing only to elevated souls who are warmed with a passion for the public good. It has no connection with that trickish and subversive kind of politics which prides itself upon clandestine projects, which acquires a glory composed wholly of human misery, which sees the prosperity of one nation in the abasement of another, and which mistakes convulsions of government for conceptions of genius. We are here employed upon the greatest interests of humanity; the art of forming the manners and the character of nations; of raising to its highest point the security of individuals, and of deriving results equally beneficial from different forms of government. Such is the object of this science, frank and generous, asking only for light, wishing nothing exclusive, and finding no means so sure to perpetuate the benefits it confers as to share them with the whole family of nations." ■

¹ *Treatise*, chap. xxii.

■ *Ibid.*

CHAPTER V

BENTHAM'S POSITION, ACHIEVEMENTS, AND INFLUENCE

BENTHAM'S voluminous publications and the large amount of unpublished manuscripts are evidence of a life of unceasing literary activity and invincible devotion to the great purpose the author set before himself. To fulfil this purpose—the radical reform of legal, political, and social defects and abuses—obviously demanded a wide range of inquiry, necessitated a demolition of effete institutions, a critical investigation into traditional views, rendered inevitable violent collisions with those—forming indeed the overwhelming majority—who held fast, blindly or deliberately, to long-established habits and ways of thinking. This extensive sphere with its broad highways and multitudinous bypaths the undaunted explorer—in the voluntary sequestration of his “hermitage”—zealously ransacked, throwing light on dark places and digging up those that were overgrown with weeds or strewn with garbage. In his truly herculean efforts to accomplish his self-imposed task, what an array of subjects he investigated, overhauled, or touched upon! The question of codification, constitutional law, parliamentary reform, local government and its relation to the central authority, religion and the state and the problem of religious disabilities and restrictions, the fundamental principles of jurisprudence, questions of ethics and of logic, the elements of political economy, the usury laws, the poor law and management of paupers and work-houses, savings banks, patent laws, legal procedure, law of evidence, political and judicial administration, oaths, law taxes, equity, and the court of chancery, law of real property, judicial organisation, organisation of the executive and public offices, penal law, the construction, management and discipline of prisons, the treatment of prisoners and of discharged convicts—all engaged his attention. Nothing escaped his ever vigilant critical eye, nothing was left without being illuminated, enriched, and vitalised by the constructive suggestions and comprehensive schemes of an ingenious and inexhaustible intellect. He no doubt slashed and flayed with unsparing vigour and unerring dexterity; but he also healed and repaired with splendid generosity and undeviating devotion.

Now bearing in mind Bentham's wide field of labour and

speculation, and remembering that he was to a large extent an innovator, we would certainly be both unreasonable and ungrateful to over-emphasise the weaknesses of his method, and make much ado about the errors and misjudgments in his conclusions. Whatever mistakes there are, they were not due, at all events, to a perverse employment of logic, to any sinister intention, to special pleading, to intentional disregard of accessible facts, to selfish motives. They were the result of his peculiar temperament, his insufficient personal experience of men and of things of the world, his too rigorous application of his fundamental principles. His ideas of psychology, ethics and sociology were sometimes crude and frequently artificial. He showed too great a disposition to regard human beings as being exactly alike; he failed to take into account their far-reaching diversity, the marked differences in their characters, their different ideals and aspirations, their different and constantly fluctuating susceptibilities, their different needs, according to the determination of time, place, custom and other circumstances. He came to believe, therefore, that all human beings—like mechanical contrivances designed to react to a certain external force—were necessarily, inevitably actuated by a hard-and-fast conception of pleasure and pain, and perforce adapted their views and their conduct to the rigid manipulations of a “felicific calculus.” Moreover, he assumed that the notions of happiness prevailing in a given country at a given time were entirely uniform, and that they also remained practically constant among all civilised communities and for all time. His individualistic attitude and his “greatest happiness” doctrine appear, in many respects, strangely inconsistent. He did not reconcile the searching of one’s own good with the aiming at the good of all or of the greatest number. He did not show how the good of each and that of the public at large may be made to coincide. He was inclined to look on society as an arithmetical sum of so many units, and did not sufficiently grasp its organic character, its development, its liability to change and decay. He was lamentably lacking in the historical sense, took no account of previous investigations, and brushed aside as “vague generalities” such conclusions and speculations as were not based on “utility.” He paid little heed to the manifestations of conscience in men, to their conceptions of indefeasible duty, of personal honour and worth, to their desire of standing well with their fellows, to their

desire for perfection. He was too ready to assume that the existence of a defective law, institution, or other human product necessarily implied the existence of an evil motive in the legislator or founder. He was too ready to believe that if any particular system was a bad one those who were responsible for it and those who worked it must be wicked. Had he possessed a deeper knowledge of human psychology and a greater power of imagination, he would have recognised that men are influenced by a multitude of vitally significant things, which are not even mentioned in his seemingly exhaustive survey. As John Stuart Mill says: "He committed the mistake of supposing that the business part of human affairs was the whole of them; all at least that the legislator and the moralist had to do with."¹

Notwithstanding these shortcomings — how many can we not condone when we are the fortunate possessors of such a vast and rich body of work? — Bentham's achievements are well-nigh inestimable. Every department of our public life, our political institutions, every portion of our civil and criminal jurisprudence, every part of our legal procedure have been profoundly affected by his work. Indeed his influence is still alive, and may be readily perceived in an act or regulation here, in a project there. Foreign states too are more or less substantially indebted to his services and luminous guidance. Our improvements in the administration of justice, extending over a period of some fifty years, are to a very great extent direct applications of the principles enumerated and repeatedly expounded by him in his writings, which constituted a veritable treasure-house for legal reformers, as well as a rich mine for statesmen and publicists. The value of these works, produced by their author for eminently practical purposes and not by way of providing themes for eternal academic disputation, may appear to be less nowadays, seeing that a multitude of reforms therein advocated have already been effected. Nevertheless, an enormous quantity still remains, which, were it but known, would provide parliamentarians and social reformers with much food for reflection; it would offer fruitful ideas in the shaping of our domestic legislative policy, and in the establishment and carrying out of schemes of amelioration.

We have seen with what extraordinary constancy and application Bentham consecrated himself to his work. We have seen how his energies were throughout animated by his whole-hearted

¹ J. S. Mill, *Dissertations and Discussions* (London, 1867), vol. i, p. 366.

love of truth and his single-minded search for it. The nature of his investigations shows him to have been a courageous pioneer, an innovator standing against the entire hosts of tradition, assailing them in their own long-established fastnesses. In truth, his shafts were levelled rather at abuses than at those he considered to be corrupters, knaves, or dupes. No one before him had dared to launch forth criticisms so consistently, and make forcible attacks on things established with such persistent vigour, with such a comprehensive merciless dissecting apparatus. Students and writers before him had for the most part been content simply to assimilate or to expound existing laws and institutions, and to endeavour to get at the underlying principles; and they invariably accepted the results arrived at without hesitation, without question. This attitude of unreasoning docility was not shared by Bentham. He refused to accept things without examining and analysing them. He manifested a remarkable questioning spirit, the like of which was never before witnessed in England, and which eventually permeated and stirred up a number of ardent souls who did much to destroy a large portion of the antiquated structure, political, legislative, administrative, judicial. And so Bentham, with his eyes on this structure, which was built up by his predecessors carelessly, piecemeal, in haphazard fashion, regardless of overlappings, clashings, contradictions, confusions, without thought of any guiding principles or all-embracing unity or possible consequences of their precipitate proposals and ill-considered proceedings—Bentham with a penetrating eye on this result exposed the numerous sophistries and fallacies, poured contempt on the platitudes and irrelevances, tore to shreds dogmatic theories, showed up the shallow pretensions of rhetoric, the injustice, the absurdity, the folly, the ponderous inconsequences veiled by ambiguous phraseology, technical verbiage, and artificial fictions. He assailed the revered superstition about the “wisdom of our ancestors,” a catchword repeated *ad nauseam*, which served as an excuse for the indolence, indifference, or self-imposed blindness of those who worshipped at the shrine of tradition. He laid bare the obscurantist character of judges, the prejudice and self-interest of the generality of lawyers. He drew attention to the inequitable character of “equity,” the undue delays of the court of chancery, and its complicated stultifying procedure.

To all this destructive criticism he united the inexhaustible

resources of a constructive genius. In this part of his work we see the ever present principle of utility, of true expediency, constantly appealed to, made the criterion of every conclusion advanced, the test of every institution proposed in the sphere of morals, or of government, of law, of education, or of anything else concerning society and the conduct of life. Nothing was too large for his grasp, nothing was too small for his consideration. Essential, governing principles, main topics, and small details were put into their proper places, so as to form a coherent harmonious whole destined to meet the wants of men and promote the happiness of the community. He showed that an extensive reconstruction was necessary, and insisted that the legislature should deliberately undertake it and carry it out fully and systematically. He pointed out that the occasional efforts of isolated judges with their facile invention of fictions—efforts, moreover, arbitrary in nature however well-intentioned their authors might be—and the whole body of judge-made law were totally inadequate, and were frequently the source of mischief. Accordingly, he strongly advocated the codification and publication of law; and, as the existing parliament was probably unequal to the task, he demanded a drastic reform in the constitution of the legislature. He showed how the code was to be self-contained, independent of extraneous interpretation. He expounded the idea of law in general, and placed it on a rational basis, cleared from the metaphysical subtleties and ambiguities of "natural law." He investigated the foundations of penal justice, and throughout offered a rich harvest of luminous suggestions calculated to produce substantial improvements. He set forth the indispensable elements of judicial procedure, civil and criminal, and of the law of evidence. He did a thousand other significant and striking things, which, taken all in all, have influenced profoundly and for good the legislation of the modern world.

In this work he was supported by a number of able disciples, including distinguished lawyers and parliamentarians, eminent statesmen and ardent reformers. Whewell observes: "The school of Bentham, for a time, afforded as near a resemblance as modern times can show, to the ancient schools of philosophy, which were formed and held together by an almost unbounded veneration for their master, and in which the disciples were content to place their glory in understanding and extending

the master's principles."¹ This statement contains, no doubt, an element of exaggeration; but it is not as inaccurate as Mill would have us believe. With the beginning of the nineteenth century the sovereign power in the state began to be gradually transferred from the hands of a privileged and limited class of landowners and wealthy merchants to those of a majority of the citizens; in other words, the democratic movement was proceeding steadily and surely. Now the period covered approximately by Bentham's life has been well described, as it has already been pointed out, as one of old toryism or legislative quiescence. This was followed by a period of nearly half a century—beginning a few years before Bentham's death, say, 1825, and ending about 1870—in which the influence of Benthamism was strikingly predominant. In many respects it coincided with the spirit of the prevailing Evangelicalism and humanitarianism. Its operation was facilitated by the rapidly changing social conditions in England,² the growing population, the invention of machinery, the development of industries, the growth of towns, the new spirit in literature, the expansion of the press, the passing away of the revolutionary storm, the perception of the inadequacy of existing parliamentary and legal institutions to meet the widespread advancing needs, and last, but most important, the enthusiasm and activity of supporters like Romilly, Brougham, Horner, Mackintosh, Joseph Hume, Francis Place, Grote, Roebuck, O'Connell, Macaulay, Sydney Smith, and others. Thus for about fifty years the epithet "Benthamite," was commonly applied to the older generation of utilitarians and individualists, a group of men who were, it may be, less speculative and less scientific than some of their successors in this school of philosophy, but who exercised a much more extensive influence on practical legislation. On the doctrines of Bentham "intelligent Englishmen could look with a respect which could not be accorded to the sincere but childish radicalism of Cartwright, to the theatrical bluster of Burdett, to the oratory and egotism of Hunt, or to the inconsistent doctrine and dubious character of Cobbett."³

It is impossible to enumerate with completeness and exactness the practical reforms directly due to, indirectly arising out of, or showing distinctive kinship with, the teaching of Bentham.

¹ *Lectures on the History of Moral Philosophy in England* (1852), lect. xiii.

² Cf. Dicey, *op. cit.*, pp. 111 seq.

³ *Ibid.*, p. 173.

In 1843 a writer¹ pointed out the large number of reforms that were first proposed by Bentham and afterwards adopted by parliament. Since that date a great multitude of his projects and suggestions have borne prolific fruit. Without attempting to give a full list or precise classification, the following measures may be mentioned as worthy of note:² (1) Political reforms, including the great Reform Act of 1832, and its corollary, scarcely less notable, the Municipal Corporations Act, 1835. (2) Humanitarian measures, comprising, first, prison reform and substantial improvements in the penal law, e.g. the pillory abolished, 1816 (56 Geo. III, c. 138), 1837 (7 Will. IV, and 1 Vict. c. 23); the laws as to whipping of women abrogated, 1820 (1 Geo. IV, c. 57); hanging in chains abolished, 1834 (4 and 5 Will. IV, c. 26); gradual reduction in the number of capital offences, till the death penalty came to be, practically, confined to cases of murder, between 1827 (7 and 8 Geo. IV, cc. 29, 30) and 1861 (24 and 25 Vict. cc. 96-100); public execution of murderers prohibited, 1868 (31 and 32 Vict. c. 24); secondly, acts to protect children, 1840, 1864, and lunatics, 1828, etc., and to guard sane men from the risk of confinement in lunatic asylums; thirdly, prevention of cruelty to animals, 1822, 1833, 1835, 1849, 1854, etc.; fourthly, abolition of the slave trade. (3) Extension of individual liberty and promotion of the freedom to enter into contracts, e.g. abolition of the offences of forestalling and regrating, 1844 (7 and 8 Vict. c. 24), and of usury, 1833-1854; repeal of the Navigation Laws, 1846, 1849; marriages made civil contracts, 1835, etc., and also made capable of dissolution (Divorce Act, 1857); amelioration of the combination law, 1824-1825; limited liability companies made possible, 1856-1862; freer dealing with property allowed, abolition of the barring of entails by fictitious actions, 1833; also the establishment of the remarkable Poor Law of 1834; the rights of free discussion and religious liberty extended. Further, there were enactments for reforming legal procedure, including the regulation of judicial evidence, the removal of the restrictions as to the admissibility of evidence, 1846, 1851 (Evidence Act), 1869 (Evidence Further Amendment Act), 1898 (Criminal Evidence Act), 1852 (Chancery Procedure Act), 1875 (Judicature Act); John Doe and Richard Roe, together with their accompanying fictions, were banished

¹ J. H. Burton, *Benthamiana* (Edinburgh, 1843), pp. 350, 351.

² Based on Dicey's list, *op. cit.*, pp. 185 seq.

from the courts, 1852 (Common Law Procedure Act, 15 and 16 Vict. c. 76); appeal of murder and trial by battle were abolished, 1819 (59 Geo. III, c. 46); a prisoner on trial for felony allowed the aid of counsel, 1836 (6 and 7 Will. IV, c. 114). Improvements were also made in the constitution of the courts, clearer provisions as to their jurisdiction were laid down, and law costs were reduced. To promote equality among subjects in regard to the law, benefit of clergy was removed in the case of delinquents who were clerks in orders, 1827 (7 and 8 Geo. IV, c. 28), and the privilege of peerage was abolished, 1841 (4 and 5 Vict. c. 22).

The period of Benthamism—liberal individualism—was succeeded by one of collectivism, the aim of which was to effect a social regeneration. But even here the indebtedness to Benthamite utilitarianism is manifest; for the socialists have derived therefrom a fundamental legislative principle, namely, utility; a legislative instrument, in their constant insistence on parliamentary intervention; and a legislative tendency, namely, the extension and improvement of administrative and departmental machinery.¹

In conclusion, then, it may be said that Bentham was "created to be the inventor and patentee of legal reforms."² He was indeed one of the very greatest seminal minds of England. He holds a place "among the masters of wisdom, the great teachers and permanent intellectual ornaments of the human race."³ At first his projects were either ridiculed or contemptuously disregarded, his fundamental ideas were assailed as subversive doctrines and dangerous paradoxes. But his genius, supported by signal courage and perseverance, in the end triumphed over all obstacles, and achieved a wonderful victory. His works came to be everywhere a rich pasture for ardent souls aspiring to ameliorate the condition of their country and their fellow-beings. "He found the philosophy of law a chaos, he left it a science; he found the practice of the law an Augean stable, he turned the river into it" which mined and swept away "mound after mound of its rubbish."⁴ If we bear in mind the nature and importance of his work, its originality, its enormous extent, its many-sided character, its universal influence, its far-reaching practical results, and its potential virtues we are tempted to proclaim Bentham the greatest legal philosopher and reformer the world has ever known.

¹ Cf. Dicey, *op. cit.*, pp. 303-306.

² J. S. Mill, *Dissertations and Discussions*, vol. i, p. 339.

³ *Ibid.*, p. 131.

⁴ *Ibid.*, p. 368.

PART III

SIR SAMUEL ROMILLY (1757-1818)

CHAPTER I

LIFE OF ROMILLY

ONE of the most distinguished members of the Benthamite circle was Romilly, though he was not a thorough utilitarian radical, and did not accept all the views propounded by the dominating luminary. Romilly's name is more particularly associated with the reform of criminal law, not by virtue of a multitude of writings, as in the case of Bentham, but through his personal advocacy of numerous ameliorations in the House of Commons, where face to face with bitter opponents he accomplished great work by dint of signal courage, untiring perseverance, reasoned eloquence backed up by a supremely beautiful, disinterested, self-denying soul. A delightful living essayist scarcely exaggerates when he expresses himself in the following terms: "Among the many brilliant lawyers who have, like birds of passage, flitted through the House of Commons, on their way to what they thought to be better things, I know but one of whom I could honestly say, 'May my soul be with his!' I refer to Sir Samuel Romilly, the very perfection, in my eyes, of a lawyer, a gentleman, and a member of parliament, whose pure figure stands out in the frieze of our parliamentary history like the figure of Apollo amongst a herd of satyrs and goats."¹ Indeed, those who know the man—his shining personality, the beauty and goodness of his character, his self-sacrificing labours—find it difficult to speak of him in merely ordinary or measured terms of love and veneration.

Sir Samuel Romilly, the youngest of nine children (of whom only the last three reached the age of maturity) of Peter Romilly, jeweller, of Soho, and Margaret, daughter of Aimé Garnault, a Huguenot refugee, from Châtellerault in Poitou, was born on March 1, 1757, at 18 Frith Street, Soho. His father, born in 1712, was a younger son of Étienne Romilly, also a Huguenot refugee, who came from Montpellier, and Judith, second daughter of François de Montsallier, merchant, of Shoreditch. He appears

¹ A. Birrell, "The House of Commons," in *Miscellanies* (London, 1902), p. 228.

to have been a charitably disposed and upright man, with some taste for reading, the fine arts, and gardening; and by steady devotion to his business realised a considerable competence, though he had at an early age been left to his own resources. He died August 29, 1784, when Samuel was twenty-seven years of age, and on the road to success. The mother, Margaret Romilly, who was a confirmed invalid at her youngest son's birth, died April 30, 1796. Accordingly, young Samuel was indebted for his bringing up and earliest education to a female relative, who taught him to read from the Bible, the *Spectator*, and an English translation of *Télémaque*, and to a Methodist maid-servant who stuffed the child's tender mind with horrible stories of ghosts and devils. These together with his own subsequent reading of the lives of the martyrs, and the dreadful details recounted in a copy of the *Newgate Calendar*, co-operated to impart to him such strong impressions of gloom and melancholy, that they never really left him throughout the whole course of his life. (We have seen a similar thing in the early life of Bentham.) The early tendencies, indicative of a pronounced sprightliness and vivacity, were frequently counterbalanced by a marked strain of nervousness and anxiety. "The indisposition of a relative or friend, the absence of his father beyond his usual hour of return at night, and various little incidents, generally unnoticed or disregarded by the happy thoughtlessness of youth, would occasion him the most serious uneasiness, setting his imagination at work to anticipate the worst results, and to conjure up a thousand phantoms of improbable dangers. This disposition, though subsequently tempered by years of reflection, was never perhaps wholly subdued."¹ Romilly himself thus describes his early experiences, in his *Memoirs*, under the year 1796: "In my earliest infancy, my imagination was alarmed and my fears awakened by stories of devils, witches and apparitions; and they had a much greater effect upon me than is even usual with children; at least I judge so, from their effect being of a more than usual duration. The images of terror, with which those tales abound, infested my imagination very long after I had discarded all belief in the tales themselves, and in the notions on which they are built; and even now [that is at the age of nearly forty] although I have been accustomed for many years to pass my evenings and my nights in solitude, and without even

¹ *Speeches*, Introductory Memoir, vol. i, p. viii.

a servant sleeping in my chambers, I must with shame confess that they are sometimes very unwelcome intruders upon my thoughts. . . . The prints, which I found in the lives of the martyrs and the *Newgate Calendar*, have cost me many sleepless nights. My dreams, too, were disturbed by the hideous images which haunted my imagination by day. I thought myself present at executions, murders and scenes of blood; and I have often lain in bed agitated by my terrors, equally afraid of remaining awake in the dark, and of falling asleep to encounter the horrors of my dreams.”¹

His father (now removed to Marylebone in order “to get better air”) attended with his family alternately at a French Protestant chapel established by refugees, and at the parish church. “It was a kind of homage which he paid to the faith of his ancestors, and it was a means of rendering the French language familiar to us.”² Sent to a day-school, which was kept by an incompetent and brutal master of the name of Flack, Romilly was taught there little more than the three R’s. He afterwards remembered that the faults and mischievous dispositions of his fellow-pupils, most of them sons of the neighbouring bakers, butchers, and barbers, appeared to increase the more severely they were treated.³

After he left this unpromising school, his father conceived the notion of making him adopt the profession of a solicitor. Among his acquaintances there was a certain city attorney named Liddel. The latter, in the words of Romilly, was “a shortish fat man with a ruddy countenance, which always shone as if besmeared with grease; a large wig which sat loose from his head; his eyes constantly half shut and drowsy; all his motions slow and deliberate; and his words slabbered out as if he had not exertion enough to articulate. His dark and gloomy house was filled with dusty papers and voluminous parchment deeds; and in his meagre library I did not see a single volume which I should not have been deterred by its external appearance from opening. The idea of a lawyer and of Mr. Liddel were so identified in my mind, that I looked upon the profession with disgust, and entreated my father to think of any way of life for me but that.”⁴ The next proposal was to place him in the commercial house of the Fludyers, his father’s relatives, one of whom, Sir Samuel Fludyer, was an alderman of the City of London, a member of parliament, and eventually Lord Mayor. For the purpose of this

¹ *Memoirs*, vol. i, pp. 10–12. ² *Ibid.*, pp. 14, 15. ³ *Ibid.*, p. 16. ⁴ *Ibid.*, p. 18.

employment the boy was taught book-keeping and accounts; but the project was defeated by the death of both partners in the firm. Various other schemes that were planned were also unsuccessful. Accordingly, he became an assistant in his father's shop. Here he had much leisure for reading; all books that fell into his hands from his father's collection and from circulating libraries were devoured. They consisted chiefly of English poetry, ancient history, and works of literary criticism; and among these subjects poetry soon acquired a pre-eminent position. "After a few attempts I found myself, to my unspeakable joy, possessed of a tolerable faculty of rhyming, which I mistook for a talent for poetry. I wrote eclogues, songs and satires, made translations of Boileau, and attempted imitations of Spenser. My feeble verses and puerile images were received with the most flattering applause by my family, and afforded supreme delight to myself. I was soon persuaded that I possessed no inconsiderable share of genius. My father's business became every day more unpleasant to me."¹

At the age of sixteen he began to study Latin under a private tutor; and soon he was able to read Cæsar, Livy, and Cicero. He practised the excellent method of writing out translations into English, and retranslating them into Latin. In the course of some three or four years he managed to read through most of the great Latin authors; Livy, Sallust, and Tacitus he read three times, besides going through nearly the whole of the voluminous Cicero; Terence, Virgil, Horace, Ovid, and Juvenal were read more than once. (What a contrast to the wretched snippets distilled out to the tender appetites of pupils in our schools!) He seems to have found Greek more difficult, and saw that a similar acquisition of that language would be impossible "without sacrificing a large portion of time which might be more usefully employed"; so he read the Greek masterpieces in Latin and English versions. Besides the classics, he gave his attention also to works of history and travels, which he studied always with the aid of maps, and to natural history and natural philosophy. From his father he acquired a taste for pictures and prints, and he availed himself of the courses of lectures on painting, architecture and anatomy delivered at the Royal Academy.

By the death of a relative of his mother the family acquired a fortune of some fourteen or fifteen thousand pounds, of which

¹ *Memoirs*, vol. i, p. 22.

a sum of £2,000 was set apart for himself. His father therefore removed from the lodgings in Marylebone to a house. Romilly paints a picture of happy, cheerful home life, with serious reservations, however, in regard to himself. "But yet with such means of happiness, and in the midst of enjoyments so well suited to my temper and disposition, I was not completely happy. The melancholy to which I had from my childhood been subject, at intervals oppressed me; and my happiness was often poisoned by the reflection, that at some time or other it must end. . . . The dislike which I had conceived for my father's business every day increased, and I earnestly wished for some other employment."¹ Then his father's law project was again discussed; and Romilly was eventually articled to one W. M. Lally, a solicitor, and one of the six sworn clerks in chancery. He now began to learn the mysteries of orders, motions, and pleadings, and gained valuable experience in the courts. But he kept up his general reading, and aiming at becoming a distinguished author he practised prose composition, translated much from Latin, studied Addison, Swift, Bolingbroke, Robertson, and Hume, and made notes of such expressions as were marked by peculiar propriety and felicity.

In 1777 he made the acquaintance of the Rev. John Roget, the newly appointed minister of the French chapel. The latter soon introduced to the enthusiastic young man the writings of his countryman Rousseau, to whose literary power and novel ideas Romilly, like all other youthful readers, fell a prey. "With what astonishment and delight," he writes some twenty years later, "did I first read them! I seemed transported into a new world. His seducing eloquence so captivated my reason that I was blind to all his errors. I imbibed all his doctrines, adopted all his opinions and embraced his system of morality with the fervour of a convert to some new religion. That enthusiasm has long since evaporated, though not being above being moved by him. . . . I ascribe, in a great degree, to the irrational admiration of him, which I once entertained, those dispositions of mind, from which I have derived my greatest happiness throughout life."² He refers to his love of virtue, hatred of political or religious oppression, and a contempt for all false glory.

In 1778 the ties between Roget and Romilly were more closely cemented by the marriage of the former to Romilly's sister.

¹ *Ibid.*, p. 28.

² *Ibid.*, pp. 31, 32.

By this time he had given up the idea of qualifying himself to purchase one of the clerkships in chancery, and determined to join the bar. On May 3, 1778, he was enrolled a member of Gray's Inn; and a year afterwards he thus wrote of his purpose and ambition: "The business of my life will be to render service to my country and my fellow-citizens; it is my duty, however fruitless my efforts should prove, not to lose courage, but constantly to aspire to a degree of eminence which will give a large field to my industry." He adds: "This would, I know, with the world pass for a philosophic apology for vanity and ambition, but I hope from you I am not to expect the judgment of the world." ¹

In the meantime he continued his reading and literary exercises more enthusiastically than ever; his aim was to acquire a wide general knowledge, and for this purpose he made excellent and systematic use of a commonplace-book. He did his utmost to form a correct, clear, precise, elegant style. He persevered in his translations from Latin authors; wrote, anonymously, political essays for the press; and to gain facility of oral utterance he expressed to himself in the best language possible whatever he had been reading, and whilst walking or riding composed replies to speeches he had heard in the Houses of Parliament. What with the arduous application to his studies and much anxiety due to extraneous sources his health was impaired; and so, in 1780, he went to Bath for the "cure," which left him worse. After his return to London, the Gordon riots broke out. "The Inns of Court," he says, "were marked out objects of destruction; and Gray's Inn, in which many Catholics resided, was particularly obnoxious. . . . The barristers and students of the different Inns of Court determined to arm themselves in their own defence." ■ Illness and a delicate constitution notwithstanding, he remained a whole night in arms, and for several hours stood as a sentry at the Holborn gate. His bad health became worse through the exposure and the excitement; and the whole of the following winter he was in a feeble condition. During his convalescence he applied himself to the study of Italian, as his doctor forbade him to read any books but such as were merely amusing, and soon afterwards was able to read some of the works of Machiavelli, whose black picture of human nature he deprecated and ascribed to the author's

¹ From a letter, dated June 17, 1779, quoted by Sir William Collins, *The Life and Work of Sir Samuel Romilly*, pp. 20, 21.

² *Memoirs*, vol. i, p. 51.

insufficient experience of men, and also the treatise of Beccaria, which opened his eyes to the necessity of criminal law reform. In a letter to Roget, March 1, 1782, he points out some of the shortcomings of the Italian criminal law reformer: "I have lately read a second time Beccaria on *Crimes and Punishments*, a favourite book, I know, of yours, and I think deservedly. But does not the author too often reason by analogy to his favourite mathematics? Are not his observations sometimes too subtle? And what do you think of the principle on which he relies so much, that crimes are to be measured by the injury they do to the state, without regard to the malignity of the will?"¹ Romilly's mind was at this time brooding over this question of ameliorating the penal system, which was ere long to provide him with the grand occupation of his life. To the same correspondent he wrote, May 22, 1781, in admiration of the noble work of Howard, which offered him an additional stimulus: "Have you ever heard of a book published here some time since by a Mr. Howard, on the state of the prisons in England and in several other countries of Europe? You may conjecture from the subject that it is not a book of great literary merit; but it has a merit infinitely superior. It is one of those works which have been rare in all ages of the world; it is written with a view only to the good of mankind. The author was some time ago a sheriff in the country; in the execution of that office, a number of instances of abuses practised in the prisons came under his observation. Shocked with what he saw, he began to inquire whether the prisons in the adjacent counties were on a better footing. Finding everywhere the same injustice prevail, he resolved—a private individual—to attempt to reform abuses which he found were as general as they were shocking to humanity. Accordingly he made a visit to every prison and house of correction in England with invincible perseverance and courage; for some of the prisons were so infected with diseases and putrid air, that he was obliged to hold a cloth steeped in vinegar to his nostrils during the whole time he remained in them, and to change his clothes the moment he returned. After having devoted so much time to this painful employment here, he set out on a tour through a great part of Holland, Germany, and Switzerland² to visit their prisons. What a singular journey!

¹ *Speeches*, Introductory Memoir, p. xxix.

² Howard had already visited also Austria, Italy, France; and at the very time Romilly was writing, the great philanthropist was on a tour of inspection in Denmark, Sweden, and Russia.

not to admire the wonders of art and nature, not to visit courts and ape their manners, but to dive into dungeons, to compare the misery of men in different countries, to study the arts of mitigating the torment of mankind! What a contrast might be drawn between the painful labour of this man, and the ostentatious sensibility which turns aside from scenes of misery, and with the mockery of a few barren tears, leaves it to seek comfort in its own distresses!"¹

In the meantime Romilly spent the long vacation of the year 1781 on the Continent. In Switzerland he met Dumont, who was then a Protestant parson championing the cause of the popular party in Geneva as against the aristocratic section, and who was later to achieve European fame as a publicist. In Paris Romilly made the acquaintance of many people, notably D'Alembert and Diderot. Diderot talked to him on politics, on religion, ostentatiously avowing a disbelief in the existence of a Supreme Being, and spoke bitterly of Rousseau and of the expected *Confessions*.² D'Alembert he describes as cold and reserved. Romilly—a young man of twenty-four—does not appear to have been favourably impressed by the communications and attitude of these veteran Encyclopædists.³ But his recollections of Madame Delessert, a friend of Rousseau, were very pleasant. Thinking of her kindness to him, he wrote thirty years later (after fifteen years of a supremely happy married life): "There is nothing, indeed, by which I have through life more profited than by the just observations, the good opinion, the sincere and gentle encouragement of amiable and sensible women."⁴ At the end of the vacation he was back in London; and in a letter to his friends at Lausanne he dwelt enthusiastically on the scenes he had visited and his delightful experiences, on Geneva, Lausanne, Vevey and the Grande Chartreuse, on being "sprinkled with the dews of the waterfall near Chamberry," on "leaning over the parapet mentioned by Rousseau, and gazing at the torrent which tumbles at a prodigious depth amidst the rocks below, and, like him, throwing down stones, to see them beat against the sides of the mountains and dash in the water." His account of what he observed in Paris throws an interesting sidelight on the development of his mind at this time, apart from furnishing valuable evidence as to the condition of affairs in France: "In

¹ *Memoirs*, vol. i, pp. 169, 170.

² *Ibid.*, p. 63.

³ As to these and their colleagues, see *supra*, on Beccaria, chap. ii.

⁴ *Memoirs*, vol. i, p. 66.

the little I have seen of the French, I have found them to be much less gay than they are commonly said to be. They are merry and serious by starts, but they are strangers to cheerfulness, and still more to serenity of temper." From the assertions as to the greater mirth and gaiety appearing on their countenances than on those of the English, "one is to conclude that the French are a happier nation than the English, and consequently that a despotic government is preferable to a free one. I greatly doubt the happiness of the French; but if they are happy, they are more to be pitied than if they had been discontented, because, in their situation, it is not possible they can be happy till their souls are debased to a level with their condition. Slaves must be insensible indeed to the misery and ignominy of their state, when they can hug the chains that dishonour them, and lick the feet by which they are trampled on. Such men can never taste of real happiness; to them all its genuine sources are dried up. It is ever the policy of a tyrant to enervate the minds of his subjects, and to give them a fondness for false grandeur and empty pleasures. When he has once wrought this change in their dispositions, he may at an easy price glut them with all that they are greedy after. They will never feel the want of pleasure which they no longer have souls to enjoy. So it was in the worse days of the Roman Empire; its tyrants fed a populace, whom they had rendered stupid and sensual, with offals and gaudy shows. . . . At Versailles I assisted at the Mass. The service was very short, though it was on a Sunday; for kings are so highly respected in France, that even religion appoints for them less tedious ceremonies than what it enjoins the people to observe. The moment his majesty appeared, the drums beat and shook the temple, as if they had been to announce the approach of a conqueror. During the whole time of saying Mass, the choristers sung, sometimes in chorus, sometimes in single parts. In the front seats of the galleries were ranged the ladies of the court, glowing with rouge and gorgeously apparelled, to enjoy and form a part of the showy spectacle. The king laughed and spied at the ladies. Every eye was fixed on the personages of the court, every ear was attentive to the notes of the singers, while the priest, who in the meantime went on with the exercise of his office, was unheeded by all. Even when the Host was lifted up, none observed it; and if the people knelt, it was because they were admonished by the ringing of the bell; and

even in that attitude all were endeavouring to get a glimpse of the king.”¹

Romilly's interest in his own country—its laws, institutions, government, social conditions, foreign relations—was of course pre-eminent. He frequently attended the debates in parliament, and sent his friends in Switzerland summaries of the arguments, descriptions of the leading members and of the state of political parties, accounts of the affairs of our Indian empire, of the origin, progress, and conclusion of the American, French, and Dutch wars, and details of other events.

On the last day of Easter term, 1783, he was called to the bar. The feelings with which he approached his chosen profession are expressed in some of his private letters written at this time. In one of these he writes that he is beginning his career with diffidence, with the consciousness that his friends have formed too high an opinion of him. “I have taught myself, however, a very useful lesson of practical philosophy, which is, not to suffer my happiness to depend on my success. Should my wishes be gratified, I promise myself to employ all the talents, and all the authority I may acquire, for the public good—‘*patriæ impendere vitam.*’ Should I fail in my pursuit, I console myself with thinking that the humblest situation of life has its duties, which one must feel a satisfaction in discharging, that at least my conscience will bear me the pleasing testimony of having intended well, and that, after all, true happiness is much less likely to be found in the high walks of ambition, than in the ‘*secretum iter et fallentis semita vitæ.*’” ■

In the summer of 1783 his highly esteemed brother-in-law, Roget, died. His consolatory letters to his sister show a brother's tender solicitude, and a youth's noble aspirations tinged with sad, though calm and trustful, resignation. “It is we,” he writes, “who are deprived of the society and friendship of the tenderest, the most amiable, the most virtuous of men; but our friend is happy, which in this life he never could have been; he was too good, too tender, too affectionate for this life. It could not but be a source of misery to him as long as there were men in it who were unjust, and others who were unfortunate. Dissolution of life is not, in truth, a misfortune to any man who has lived well. . . . Hitherto your life has been most unfortunate; what remains of it you have the prospect of spending, not indeed joy-

¹ *Speeches*, Intro. Memoir, pp. xvi-xviii.

² *Ibid.*, pp. xxiv, xxv.

fully, but unruffled with tears and anxieties, in a calm and pleasing melancholy. . . . I do not exhort you, my dear sister, to dismiss all sad reflections, but rather to turn them to another object. . . . In the midst of our affliction, and under the hard lot which has befallen us, we will find out serious, nay melancholy pleasures, which might be envied by those who seem more the favourites of fortune.”¹ Soon afterwards Romilly set out to bring his sister to London. He had a letter of introduction to Benjamin Franklin, then residing at Passy. The latter had been sent by his country to Paris in 1776 to secure foreign assistance for the war, and his mission was crowned with success in September 1783, when England recognised the independence of the United States. Romilly met and conversed with the eminent American, and his impression is thus described: “Of all the celebrated persons whom, in my life, I have chanced to see, Dr. Franklin, both from his appearance and his conversation, seemed to me the most remarkable. His venerable patriarchal appearance, the simplicity of his manner and language, and the novelty of his observations, at least the novelty of them at that time to me, impressed me with an opinion of him as one of the most extraordinary men that ever existed.”² At Lausanne he also met the Abbé Raynal, who disappointed him as not coming up to expectations aroused by the Abbé’s writings.

Early next year he joined the Midland circuit, but found the society there not much to his mind. No doubt the light-heartedness, the gaiety, the occasional flippancy of members clashed with his reserve, seriousness, and determined industry. In the summer his father died. A little later he met Mirabeau, and continued friendly relationships with him till the count’s death in 1791. As Sir William Collins observes, “the influence he had on Romilly was profound, and the admiration this ‘cloud-compeller,’ this profligate who knew every villainy yet knew not the word impossible, evoked in our Huguenot Puritan was as striking as it was strange.”³ Romilly undertook the translation of Mirabeau’s tract directed against the American Order of the Cincinnati; and this pamphlet was the cause of a quarrel between Mirabeau and Sir Joseph Banks, the President of the Royal Society, and also with John Wilkes, fresh from his parliamentary triumph. Romilly was at pains to refute the reports made against Mirabeau’s character, and “made excuses for the excesses,

¹ *Memoirs*, vol. i, pp. 283, 284, 286, 287. ² *Ibid.*, p. 69. ³ *Op. cit.*, p. 12.

aberrations and vain eccentricities"¹ of his friend, who believed that "petty moralities are the enemies of great morals." Romilly observes that Mirabeau possessed the "singular faculty of bringing forward and availing himself of the talents of others. He was a great plagiarist; but it was from avarice, not poverty, that he appropriated to himself the views and the eloquence of others." But he had "the good of mankind for his object." "He was vain, and he was inordinately ambitious; but his ambition was to act a noble part, and to establish the liberty of his country on the most solid foundations. He was very unjustly accused of having varied in his politics, and of having gone over to the court." As to his receiving bribes from the king, he would not have acted otherwise had he been unbribed.² Romilly was more than once reproached by him for "damnable timidity and amiable modesty; for a powerful mind (said he) ought to have the consciousness of its own powers; shyness is not modesty, nor is timidity prudence."³ On one occasion Romilly met at dinner Mirabeau and John Wilkes. "The conversation," he relates, "turned upon the English criminal law, its severity, and the frequency of public executions. Wilkes defended the system with much wit and good-humour, but with very bad arguments. He thought the happiest results followed from the severity of our penal law. It accustomed men to a contempt of death, though it never held out to them any very cruel spectacle; and he thought that much of the courage of Englishmen, and of their humanity too, might be traced to the nature of our capital punishments, and to their being so often exhibited to the people."⁴ (If there really was any seriousness in this argument—and it seems there was, seeing that Mirabeau vehemently opposed it—it reminds us of the efforts of some of our present retailers of paradoxes, who are prepared to "prove" anything at any time.) Through Mirabeau, Romilly now made the acquaintance of Lord Lansdowne who, like a veritable Mæcenas, was ever ready to extend patronage and hospitality at Bowood to thinkers and reformers; and also gained his high opinion, as well as that of Bentham, with whom he now became intimate, by reason of his pamphlet (arising out of the case of the Dean of St. Asaph), *A Fragment on the constitutional power and duty of Juries upon Trials for Libels* (1784). This paper had been sent anonymously

¹ Sir W. Collins, *op. cit.*, p. 12.

² Cf. Sir W. Collins, *op. cit.*, p. 13.

³ *Memoirs*, vol. i, p. 109.

⁴ *Memoirs*, vol. i, p. 84.

to the "Constitutional Society," which gladly accepted it and had many copies printed and distributed. The following year Lord Lansdowne offered Romilly a seat in parliament, which, however, was refused by him. It is obvious that the admission of Romilly, a young man just beginning his career, to such a circle as Lansdowne's, is a testimony to his character and worth. It is likewise a proof of Lansdowne's liberal-mindedness to have shown interest in and esteem for an unknown youth, the son of a tradesman, without social position to recommend him, and without public school or university credentials to support him.

In 1785 appeared a publication entitled *Thoughts on Executive Justice, with respect to our Criminal Laws. . . . By a sincere well-wisher to the public*. The author of this tract was Martin Madan,¹ whose production, devoid as it was of intrinsic worth, would long ago have been forgotten, had it not been for the part it played in the criminal law controversies of the time, and its baneful influence on the practice of contemporary judges. Romilly observes that "by a mistaken application of the maxim 'that the certainty of punishment is more efficacious than its severity for the prevention of crimes,' he [the author] absurdly insisted on the expediency of rigidly enforcing, in every instance, our penal code, sanguinary and barbarous as it is: the certainty of punishment he strongly recommended, but intimated no wish to see any part of its severity relaxed. The work was, in truth, a strong and vehement censure upon the judges and the ministers for their mode of administering the law, and for the frequency of the pardons which they granted. It was very much read, and certainly was followed by the sacrifice of many lives, by the useless sacrifice of them; for though some of the judges, and the government, for a time adopted his reasoning, it was but for a short time that they adopted it; and, indeed, a long perseverance in such a sanguinary system was impossible. Lord Ellenborough, who seems to consider himself as bound to defend the conduct of all judges, whether living or dead, has lately in the House of

¹Martin Madan (1726-1790), a first cousin of Cowper; educated at Westminster School and Christ Church, Oxford; called to the bar, 1748; having abandoned gay companions, he adopted Calvinistic Methodist views, obtained ordination, aroused curiosity as the "lawyer turned divine"; was in correspondence with John Wesley; became chaplain to the Lock Hospital, near Hyde Park Corner. Published (1780) *Thelyphthora, or a Treatise on Female Ruin*, 2 vols., in which he advocated polygamy, on the basis of the Mosaic law; it naturally called forth many bitter attacks. Issued numerous pamphlets, besides translations of Juvenal and Persius. He appears to have been a gentle, studious, zealous man.

Lords, in his usual way of unqualified and vehement assertion, declared that it was false that this book had any effect whatever upon either judges or ministers.”¹ Romilly combated this statement by producing facts and figures which showed the rapid multiplication of executions, no doubt due to the sinister arguments set forth in the tract. Lord Lansdowne having suggested to Romilly to write something on the subject, the latter, on looking into Madan’s production, was so “shocked at the folly and inhumanity of it,” that he wrote an anonymous refutation instead, viz., *Observations on a late publication intituled “Thoughts on Executive Justice.”* The substance of this cogent reply will be dealt with later;² for the present it will suffice to say that Lord Lansdowne, among other discerning spirits, must have been deeply impressed by it. In a letter to the author, December 25, 1785, he remarked: “. . . Your arguments, and the authorities to which you refer, incline me to think that a revision of our penal law is not only desirable, but necessary, for the purpose of making it agreeable to the spirit of the times, and such as can be executed.”³

During the summer vacation of 1788 Romilly, together with Dumont, visited Paris and met, among the leading personages of the day, Rochefoucauld, Lafayette, Condorcet, Mallet du Pan, Jefferson (the American ambassador), Mirabeau, and the ill-fated Malesherbes. Of the last-mentioned he says: “Amongst all the eminent persons we saw at Paris, there was none who impressed me with so much respect and attachment as the good and virtuous Malesherbes.”⁴ Romilly paid a visit to Bicêtre, and was shocked at what he saw both in the hospital and in the prison; he mentioned it to Mirabeau, who asked him to put his impressions in writing. Romilly did so; and soon afterwards Mirabeau translated the account into French, and published it as *Lettre d’un voyageur anglais sur la Maison de Force de Bicêtre*, to which he added some observations on criminal law, which were almost a translation from the reply to Madan. The publication, however, was suppressed by the police of Paris. After Romilly’s return to London, the letter on Bicêtre was issued in a periodical, *The Repository*, as being a translation from Mirabeau, whereas it was in fact the original. At this time Romilly’s sympathies were with the French revolutionary party; and on the assembling

¹ *Memoirs*, vol. i, p. 89.

² *Memoirs*, vol. i, p. 328.

³ See *infra*, chap. ii.

⁴ *Ibid.*, p. 97.

of the States-General he drew up for their use, at the request of Count de Sarsfield, a statement of the procedure of the House of Commons, which was translated into French and published by Mirabeau (1789). But it was disregarded. "The leading members," says Romilly, "were little disposed to borrow anything from England. They did not adopt these rules, and they hardly observed any others."¹ The following summer he again visited Paris, met Necker, the Abbé Sieyès, Pétion de Villeneuve, and other distinguished persons.

In 1790 Romilly published anonymously a pamphlet of great power, *Thoughts on the probable influence of the French Revolution on Great Britain*. He expresses his belief that the revolution "must be attended with effects so beneficial . . . that it may justly claim the admiration of all mankind."² "It will secure the liberties of England for ever";³ it will do much to prevent war that may be contemplated in the ambitious projects of a prince or the criminal designs of a minister;⁴ it will have a "very beneficial influence on our domestic happiness, and on our own national institutions."⁵ He also persuaded his friend James Scarlett (afterwards Lord Abinger) to finish a translation, begun by himself, of a series of letters by Dumont describing the fateful events of 1789; and to these he added a few letters of his own, which embodied a trenchant indictment of English legal and political institutions, and purported to be translated from the critical work of a German observer named Groenvelt. Further, in a letter (May 15, 1792) to Madame G. he reiterates his enthusiastic opinion of the French Revolution: "Even the conduct of the present Assembly has not been able to shake my conviction that it is the most glorious, and the happiest for mankind, that has ever taken place since human affairs have been recorded; and though I lament sincerely the miseries which have happened, and which still are to happen, I console myself with thinking that the evils of the revolution are transitory and the good of it is permanent."⁶ But the disastrous course of events soon modified his views; and no doubt the influence of Bentham also operated in the same direction. Romilly therefore had the unsold copies of the above-mentioned letters destroyed. About this time too he became convinced of the untenability of Rousseauism.

¹ *Ibid.*, p. 103.

² *Ibid.*, p. 8.

³ *Thoughts*, etc. (1790), p. 1.

⁴ *Ibid.*, pp. 12, 13.

⁵ *Ibid.*, p. 6.

⁶ *Memoirs*, vol. ii, pp. 1, 2.

He had by now acquired a considerable practice in the courts—at sessions, at assizes, and in the Court of Chancery. His early labours had not met with the success due to them, perhaps on account of a certain strain of constitutional nervousness in his nature, and too great diffidence of his own powers. He was now in a position to “settle down,” did he but wish it. In a letter to Madame G. (October 14, 1794), he observed, in reply to inquiries: “I am still unmarried, and, I think, likely to remain so.”¹ But on January 3, 1798, he married Anne, daughter of Francis Garbett of Knill Court, Herefordshire. He had met her at the house of Lord Lansdowne. (He was thus more fortunate than Bentham had been in his proposal to Miss Caroline Fox, whom he had met under the same roof.) Accordingly he was obliged to reassure Madame G., to whom he wrote, February 19, 1798: “I remember telling you some time ago that I was unmarried, and likely to remain so; but I did not at that time know that such a woman, as I have now the supreme happiness of having for my wife, existed.”²

The marriage was indeed a supremely happy one. Writing in his journal in 1813, he says: “For the last fifteen years my happiness has been the constant study of the most excellent of wives; a woman in whom a strong understanding, the noblest and most elevated sentiments, and the most courageous virtue, are united to the warmest affection, and to the utmost delicacy of mind and tenderness of heart; and all these intellectual perfections are graced and adorned by the most splendid beauty that human eyes ever beheld.”³ It was a beautiful union to which Romilly—a man of modest, restrained utterance—could never refer without expressing feelings of delight, nay, ecstasy. It was, alas! but too perfect. Did he not, after his wife’s death, find it impossible to survive her?

In November 1800 Romilly took silk, and two years later became one of the leaders of the Chancery bar. In 1805 he was appointed Chancellor of the County Palatine of Durham, an office that he held for ten years and resigned chiefly because of the small amount of business, due to the fact that the Chancellor could not enforce the process of the court outside the county. His simplicity, his aversion from all superficial ceremonial and dislike of “mimic grandeur” are shown in his account of his first visit to Durham. He speaks of the numerous attendants

¹ *Memoirs*, vol. ii, p. 44.

² *Ibid.*, p. 66.

³ *Ibid.*, p. 41.

at the castle, the bows and compliments, the frequently repeated "my lord" and "your honour." "So sudden a transformation into a great man, and the lord of an old feudal palace, reminded one of Sancho's government of Barataria; and still more of Sly, the drunken cobbler of Shakespeare. But to me all this ceremonial was not more ridiculous than it was irksome." ¹

He had more than one offer of a seat in the House of Commons. His consistent refusals indicate a spirit of independence and scrupulous honour. In reference to an offer made to him (1805) by the Prince of Wales, he remarks: "I persuaded myself that . . . it was impossible that the little talents which I possessed could ever be exerted with any advantage to the public, or any credit to myself, unless I came into parliament quite independent, and answerable for my conduct to God and to my country alone. . . . I formed to myself an unalterable resolution never, unless I held a public office, to come into parliament but by a popular election, or by paying the common price for my seat." ² Accordingly, he expressed his gratitude and respectfully declined the offer, adding that he would seize the first opportunity to procure a seat, if his royal highness thought he could be useful to the public.³ As to *buying a seat*, he goes on to observe: "Certainly it would be better that burgage-tenure boroughs should not exist, or that, existing, the owners of them should never make the high privilege of nominating representatives of the Commons of England in Parliament a subject of pecuniary traffic, but should, in the exercise of it, select only men of an independent spirit, whose talents and integrity pointed them out as most worthy of such a trust. But while things remain as we now unfortunately find them, as long as burgage-tenure representatives are only of two descriptions, they who buy their seats and they who discharge the most sacred of trusts at the pleasure, and almost as the servants, of another, surely there can be no doubt in which class a man would choose to enrol himself. . . ." He says there may be circumstances in which a man may justifiably accept a seat from an owner, just as there are exceptions to all rules; but in his own case his mind was made up. "It was a rule, too, laid down for myself alone, and founded upon circumstances peculiar to myself, upon my station in life, my family, my particular profession, upon my own peculiar character, upon my past life, and the future expectations of me which I knew

¹ *Memoirs*, vol. ii, pp. 113, 114.

² *Ibid.*, pp. 120, 121.

³ *Ibid.*, p. 122.

my friends had formed, and which I had been accustomed to form myself." ¹

However, his conspicuous ability could not but be recognised by the whig party to which he had attached himself; and so on February 12, 1806, though he had not yet sat in the House of Commons, he was sworn in as solicitor-general to the Grenville administration of "All the Talents," and knighted in accordance with a custom that had been in existence some twenty years. Piggott was the new attorney-general. "Never," he says, "was any city trader, who carried up a loyal address to His Majesty, more anxious to obtain, than we were to escape, this honour." ■

Having obtained a seat in parliament as member for Queenborough (March 24), he at once took the opportunity of drawing the attention of the ministers concerned to the severity of naval and military punishments.³ The answer he usually received in such cases was that it was dangerous, or at least inexpedient, to interfere with the customary practices. As one of the managers for the Commons on the impeachment of Lord Melville (better known as Henry Dundas) for "gross malversation and breach of duty" whilst treasurer of the navy, he summed up the evidence at the trial in Westminster Hall (May 10) in a speech whose great power, perspicuous order, and logical cogency were acknowledged by all, and were warmly spoken of by Fox. He also examined witnesses before the royal commission appointed to inquire into the conduct of the Princess of Wales, and represented the Prince of Wales (afterwards George IV)—who entertained a high opinion of Romilly and marked him out for the highest office—in the proceedings respecting the guardianship of Mary Seymour. In the House of Commons he supported a resolution moved by Fox against the slave trade (June 10, 1806). He pointed out that nations as well as individuals are sometimes guilty of the most immoral acts through a lack of courage to inquire into their nature and consequences; he emphasised that the African slave trade was carried on by "rapine, robbery, and murder, by encouraging and fomenting wars, by false accusations and imaginary crimes," and declared that it was "a stain upon our

¹ *Memoirs*, vol. ii, pp. 127 *seq.*

² *Ibid.*, p. 136.

³ The object of this chapter is to give a brief outline of Romilly's life, and to mention as far as possible in chronological order his varied activities in parliament, and his efforts to effect legal and political reforms. His views on the criminal portion of this work will be considered in ■ collected form, and more fully and systematically, in the next chapter.

national reputation that ought instantly to be wiped away." ¹ These expressions gave great offence to several members. But the sensitiveness and irritability of opponents did not suppress the efforts of one so invincibly attached to what he considered his duty. "... As I should think it criminal," he says, "to speak of such a trade otherwise than as it really is, I shall probably use the same expressions again, when I have the next occasion to speak of it." ² And he did so the following February, when his speech made a considerable impression on the House.

On July 22, 1806, he got through a bill for the amendment of the bankruptcy laws. The great expense of Chancery proceedings, due to the exorbitant stamp duties, also engaged his attention.

In October 1806 parliament dissolved; and a few days later Romilly was again returned for Queenborough. At the end of January of the following year, he moved for leave to bring in a bill to make freehold estates assets to pay simple contract debts. Lord Ellenborough, to whom Romilly sent a copy of the bill, thought the judges ought to be consulted first on such a measure; but Romilly replied that as he had already given public notice of it, he could not withdraw it, and held, moreover, that it was "a most unconstitutional doctrine that no important alteration can be made in the law, unless the judges are first consulted on it." In that case it would be constituting them "a fourth member of the legislature, who are to have something like what has been called the initiative in legislation; a power of preventing any proposed measure not only from passing into a law, but even from being debated and brought under the view of parliament; and this important power, too, exercised not ostensibly, and as public men, with all the responsibility which belongs to the discharge of any public duty, but with the indifference and carelessness which necessarily must attend such private communications." ³ The third reading of this bill took place on March 18, 1807, when it was rejected by 69 to 47. The principal opposer was the Master of the Rolls, whose arguments were purely technical. "He said that justice was in such a case entirely out of the question; expediency was all that was to be considered. . . . He talked too of the dangers of innovation." ⁴ A month later another bill to make the freehold estates of traders liable

¹ *Speeches*, vol. i, pp. 7, 8.

² *Ibid.*, pp. 184, 185.

³ *Memoirs*, vol. ii, p. 152.

⁴ *Ibid.*, p. 193.

for their debts passed the third reading; whereupon Romilly comments that though the same objections applied to this as much as to the former bill, none was urged against it—"county gentlemen have no objection to tradesmen being made to pay their debts."¹ The bill, however, was lost in the Lords, by the dissolution of April 27. In the meantime (April 9) Romilly had delivered a powerful speech condemning as unconstitutional the pledge of the Duke of Portland's ministry not to advise the king to approve the policy of Catholic emancipation, which the whigs were suspected of favouring. He "felt mortified and chagrined to the utmost degree."

At the general election he was returned (May 12) for Horsham. Early in June he is contemplating an amendment of the defective and oppressive law of creditor and debtor, which entails imprisonment for debt. Pending this project, he introduced a bill (July 17, 1807) to dispense with the necessity of delivering office copies of bills in equity to members of parliament who were defendants. They had been relieved of the ordinary costs of a suit, to the detriment of their opponents who, having to bear the double burden, were often unable to prosecute their suits to a hearing. He hoped, also, that when the bill got to the Lords, an amendment would be added including peers of the realm; for it seemed to him to be open to objection that a bill to deprive peers of privileges should originate in the Commons. On July 27 the bill passed the Lords without any alteration. On July 7 he supported a motion for the appointment of a committee to inquire into the number of places and pensions held by members of parliament and their wives and children; he insisted that the truth on this subject should be known, because it would help to cope with the influence of the Crown on the deliberations of parliament, and would also set right the dangerous exaggerations that were becoming every day more prevalent. Some four weeks later he spoke in favour of Whitbread's bill for establishing parochial schools; and replying to the arguments of opponents that political and religious errors might thereby be imparted to the lower classes, he urged that the object of the bill was not to give knowledge to the poor, but to qualify them to acquire it.²

After his fatiguing labours in the courts and in the House of Commons, he went to the Isle of Wight for the summer recess. Writing to Dumont he says: "I hope to enjoy, for some weeks

¹ *Memoirs*, vol. ii, p. 204.

² *Ibid.*, p. 223.

at least, the greatest of earthly blessings—the most perfect calm and tranquillity, in a beautiful country, and with those who are the dearest to me in the world.”¹ And he promises himself a variety of pleasures in acting as his son’s tutor, reading interesting books, strolling about the country, sailing on the sea, and admiring the cheerful and varied scenes of the neighbourhood.² He is also meditating on the criminal law, its defects, and evils incidental to its administration; and recollecting instances of injustice that fell within his personal experience, he is convinced that provision should be made for granting compensation to those who have been acquitted and to those who have been wrongfully convicted; and also that the value of articles should be raised the theft of which was a capital felony. He prepares arguments for commending such measures to the House, thinks over all possible objections that may be urged against them, draws up answers to them, and drafts a bill to provide compensation to persons wrongfully accused.³ Later, in a conversation with Scarlett, the latter urged him not to confine himself to such comparatively small measures, but to endeavour to bring about a repeal of all the statutes that punish with death mere thefts unaccompanied by violence or other aggravating circumstances. This suggestion was agreeable to Romilly who, however, saw no prospect of carrying through such a wide bill. Therefore he thought it more prudent to attempt to abolish these laws one by one, and to begin with the act of Queen Elizabeth (8 Eliz. c. 4) which makes pocket-picking a capital felony.

At this time we find Romilly reflecting on his earlier aspirations and on the aims he had hoped to accomplish as Chancellor; he sees that the course of public events has brought the woolsack wellnigh within his reach, but he avows it is now far less an object of desire to him. He realises the powerlessness of an individual, in view of the condition of public affairs, and the little chance he would have in bringing about his plans. “The aspect of public affairs,” he writes, “has strangely altered in this short interval. Who can look at what has taken place in the rest of Europe, and think of what may be expected here, and consider offices of high trust as objects of envy? What, in such times as those which are fast approaching, is a man of high rank, but a person who is destined to bear a larger portion than others of the public misfortunes? What a minister, but a man raised to eminence, only

¹ *Ibid.*, p. 233.

² *Ibid.*

³ *Ibid.*, pp. 235, 236.

that he may be responsible for calamities which it is not, however, in human wisdom to avert? If there be any mode by which I could ever render any service to my countrymen, it could only be by advancing the arts of peace, by useful laws, and salutary reforms; by promoting the diffusion of science, and the improvement of the public morals: but what room will there be for all this in the troublous times which we may expect, and with the dispositions which we see entertained by those on whose will the success of such things principally depends? Deprived of the hope of doing that good which I had once flattered myself it might be my singular good fortune to achieve, what motive can I now have for accepting such an office? If I consult only my own happiness, or the good of those who are dearest to me in the world, I can never hesitate a moment to refuse it, under whatever circumstances it may be offered to me. Not that I pretend to be so free from vanity as not to be highly gratified at being thought endowed with qualities worthy of so eminent a station. I have no claim to the merit of such philosophy. On the contrary, I am sensible to the praises and the admiration of those with whom I live, to a degree of which I have reason, perhaps, to be ashamed; but I know that all such gratifications are of short duration, and that they are most dearly purchased at the price of that domestic peace and tranquillity which must infallibly be sacrificed to obtain them. To live without interruption in the bosom of my family; to enjoy every day, and almost every hour, the affectionate and endearing society of that most sensible and most amiable woman with whom I have the happiness to be united; to watch and improve the dawnings of reason in the children I am blessed with; to forget, in poring over the pages of historians, of poets, and of philosophers, the evils which are at this moment afflicting the world;—these are my dearest and fondest enjoyments: all these must be resigned. I cannot devote any portion of my time to such objects without betraying my duty. Every hour must be consumed in the most laborious occupations, or, what is still more hateful to me, in the parade of courts, the giving audiences, and entertaining strangers; in pomp and show, in unprofitable forms and unmeaning ceremonies. And what should I reap from this splendid but painful drudgery?—for the public, nothing; for my own reputation, nothing; and in point of emolument I must even to a great degree be a loser.”¹

¹ *Memoirs*, vol. iii, pp. 395–397.

With great regret he contemplates the disastrous influences of the French Revolution. "The influence which the French Revolution has had over this nation has been in every way unfavourable to them. Among the higher orders it has produced a horror of every kind of innovation; among the lower, a desire to try the boldest political experiments, and a distrust and contempt of all moderate reforms. In the very limited attempt which I have already made to begin to alter and improve those barbarous and irrational laws, respecting the rights of creditors over the property and persons of their debtors, which disgrace this country, I have experienced how indifferent the great body of the public is to such subjects, and how much power is attached to a senseless cry of the wisdom of our ancestors, when it is set up to defend institutions of which the forms and names have long survived the spirit and reason."¹

Romilly's projects were to receive a brief check; for he was unseated, on petition, February 26, 1808. But he purchased for a sum of £3000 the representation of Wareham, Dorset, for which he was returned, April 20. He justified this undesirable, but customary, practice on the ground that his independence would be maintained, and that his sole purpose of serving the public might be fulfilled.² It will be remembered that he had already on more than one occasion declined the offer of a seat.

On May 18, 1808, he moved for leave to bring in two bills to repeal the above-mentioned statute of Elizabeth, and to grant compensation, in certain cases, to persons tried for felonies and acquitted. No direct opposition was offered to the first motion, though some members, incapable of more pointed arguments, resorted to the customary weapons of the anti-reformer, viz., murmurs and cries about the danger of innovation, and eulogies of the existing criminal law.³ The second motion met with greater resistance. Some opponents misconceived its object, others disapproved of it because of the burden that would be imposed on the county rates. Perceval, then Chancellor of the Exchequer, was doubtful about the measure, but thought leave ought to be given to bring in the bill. Leave was given, but the compensation bill was afterwards withdrawn. A few weeks later (July 4) the bill to abolish the death penalty for privately stealing from the person passed, with certain alterations made by Plumer,

¹ *Ibid.*, p. 399.

² Cf. *ibid.*, vol. ii, p. 207.

³ Romilly's views on this subject, and those expounded in regard to later bills, will be considered in the following chapter.

the solicitor-general. (It is the act 48 Geo. III, c. 129.) With respect to these legislative efforts to effect some reform, Romilly refers to the widespread hostility, the retarding influence of the French Revolution, the blind unreasoning opposition of those terrified by proposed innovations. "If any person be desirous of having an adequate idea of the mischievous effects which have been produced in this country by the French Revolution and all its attendant horrors, he should attempt some legislative reform, on humane and liberal principles. He will then find, not only what a stupid dread of innovation, but what a savage spirit it has infused into the minds of many of his countrymen. I have had several opportunities of observing this." Thus, while he was standing at the bar of the House of Commons, a young man, brother of a peer, came up to him and stammered out: "I am against your bill; I am for hanging all." Romilly supposed he meant that the laws ought to be executed, as certainty of punishment afforded the only prospect of suppressing crimes. "No, no," he said, "it is not that. There is no good done by mercy. They only get worse; I would hang them all up at once."¹

In the meantime he opposed a bill (May 19) which made it more difficult for paupers to acquire settlements in parishes; he thought the law of settlements should be abolished altogether. He spoke against a similar bill (June 14, 1810), and showed how it would be oppressive to the lower orders of the people. In the case of the Local Militia Bill (May 30, 1808), he showed the mischief of frequently exacting oaths, and pointed out that men would come to think lightly of the obligations imposed thereby, and perjuries would consequently increase. Further, he opposed suggested new taxes on legal proceedings and on conveyance of property, and argued against a bill making it a felony to steal oysters from oyster fisheries.

Despite failures and much bitterness shown towards him, Romilly did not relax his perseverance and determination. He obtained valuable aid from a few zealous supporters in the House of Commons, as well as encouragement from other enthusiastic spirits. Thus, Dr. Parr, a warm admirer, referring in a letter (September 28, 1808) to Romilly's efforts, to the difficult circumstances, and to the seeming want of commonsense and common justice in the majority of his opponents, goes on to say: "Your

¹ *Memoirs*, vol. ii, p. 254.

achievement was noble, and I hope you will follow it up. . . . Lawyers and philosophers deride us poor ecclesiastics for our dogmatism, our bigotry, our ignorance, our subtleties, and our intolerance upon certain mysterious subjects; but I will wager my best and largest wig against Lord Eldon's, and my best Greek folio against Lord Ellenborough's *Abridgement of the Statutes*, if your brethren of Westminster Hall are not a match for the Convocation in England, the General Assembly in Scotland, and even the Conclave at Rome, in zeal about trifles, in attachment to dogmas, in faith in absurdities, in jealousy towards inquirers, and in a spirit of unrelenting persecution against all reformers." ¹

On February 1, 1809, he brought in a bill to extend the benefit of the Lords' Act (32 Geo. II, c. 28) to the case of persons imprisoned for not paying money or costs ordered to be paid by courts of equity. The bill met with success in both Houses, and became the act 49 Geo. III, c. 6. Another bill (March 3, 1809) to improve the law of bankruptcy by provisions for the proof of certain debts then not provable, for the reduction of costs, and against the cruel oppression of debtors by their creditors, was equally successful (June 19) after some alterations and additions had been made by the Lords. (It is the act 49 Geo. III, c. 121.)

In March Romilly took an important part in the investigation of the Duke of York's suspected corruption in the course of his official duties as commander-in-chief. Though the king had declared that anyone who was against the duke was also against himself, and though Romilly was assured by many that his intervention would cost him the Lord Chancellorship, for which he was undoubtedly singled out, yet he performed what he held to be his duty without fear of consequences, with scrupulous honesty and sincerity, with signal disinterestedness and conscientiousness. Along with others, he received votes of thanks from a great many meetings in all parts of the country. But he courted popular applause as little as he sought royal favours. Further, he voted (in a minority of 85 against 310) in favour of a motion (May 11, 1809) that an inquiry should be held into the conduct of two of the ministers (Lord Castlereagh and Perceval), who were charged with procuring a seat for a certain member for a sum of money, trying afterwards to influence his vote upon

¹ *Ibid.*, pp. 259, 260.

the inquiry respecting the Duke of York, and, having failed in this attempt, bringing about his resignation. "The offence," observes Romilly, "was no less than obliging a magistrate to resign a judicial office, because he was about to decide a cause as his conscience dictated, but as ministers disapproved. The conduct of the late ministers, considered merely with a view to their own interest, is highly impolitic. Nothing that could be proved against them will do them more injury in the public opinion than this screening of political offences, through fear of recrimination."¹

Next he opposed (June 9) the attorney-general's Seditious Meetings Bill, intended to make every house, not licensed by two justices, in which lectures were given or debates held on public grievances or matters relating to the laws, constitution, government, or policy of the realm, and to which persons were admitted for money, a disorderly house, and to make all involved punishable. Romilly protested that it was "a most insidious attack upon the liberties of the people . . . and on the diffusion of knowledge," and succeeded in getting the bill withdrawn. A motion (June 12) to prevent Welsh judges from sitting in parliament secured his support, as he thought it important to keep distinct the judicial from the legislative character. He spoke warmly in favour of Lord Erskine's bill declaring it a misdemeanour to commit malicious and wanton cruelty to animals. It was lost, however, in a thin house.²

Now we come to a more ambitious effort of Romilly. On February 9, 1810, he moved for and obtained leave to introduce three bills to abolish the death penalty for stealing privately in a shop goods to the value of five shillings, and for stealing to the amount of forty shillings in dwelling-houses, or on board vessels in navigable rivers. He pointed out the sanguinary nature of English penal law, the multiplicity of capital punishments, showed by facts and figures the disastrous results of excessive severity, the violation by juries of their oaths, and the verdicts contrary to the evidence, urged that certainty of punishment is more efficacious than rigour and ferocity, that it is indispensable to proportion penalties to offences, to make laws clear and unambiguous, to establish rational procedure and rules of evidence, to organise a vigilant police; and he elaborately confuted the views of Paley. He concluded with the words: "For the honour

¹ *Memoirs*, vol. ii, p. 287.

² *Ibid.*, p. 294.

of our national character, for the prevention of crimes, for the maintenance of that respect which is due to the laws, and to the administration of justice, and for the sake of preserving the sanctity of oaths, it is highly expedient that these statutes should be repealed.”¹ In the debate that followed, some members declared that Romilly was misled by wild and visionary schemes of perfection; others protested against the criticism directed against the venerable Dr. Paley; others again, with their usual panegyrics on the wisdom of their ancestors, vouched they would view with a jealous eye all innovations, and would ever offer opposition to principles tending to subvert the whole criminal law and to excite odium and discredit against the judges and legal administration. The substance of Romilly’s great speech delivered on this occasion was afterwards (March 12) published, with a few additions, as a pamphlet entitled *Observations on the Criminal Law as it relates to Capital Punishments, and on the mode in which it is administered*.² In reference to the motion and to the published speech, it will be of interest to record here the comments of Dr. Parr, and the distinguished philosopher Dugald Stewart. The former observes:³ “. . . The crimes of unhappy men in our own days are much less aggravated than they were formerly. . . . When offences have not increased in a number at all proportionate to our increased population, and when their malignity is less, the legislature has been strangely employed in multiplying capital punishments. . . . Paley . . . commends, it is true, the paucity of executions, but he avowedly and elaborately vindicates the number of laws which ordain capital punishment.” Therefore, “you censure the multiplicity of laws which cannot be enforced. . . . I observe that your brethren seldom or never touch on those great and leading principles of jurisprudence, which Beccaria and Bentham have so well illustrated.” The Scottish thinker says:⁴ “. . . On every point which you have there touched upon, your reasonings carried complete conviction to my mind. . . . I hope that nothing will discourage you from the prosecution of your arduous undertaking, in which you cannot fail to be seconded by the good wishes of every man of common humanity, whose understanding

¹ *Speeches*, vol. i, p. 182.

² 2nd edition, 1811; 3rd edition, 1813. It is reprinted verbatim in *Speeches*, vol. i, pp. 106 *seq.* See also *infra*, chap. ii.

³ Letter to Romilly, Feb. 21, 1810; *Memoirs*, vol. ii, pp. 309, 310.

⁴ Letter to Romilly, June 28, 1810; *Memoirs*, vol. ii, pp. 310, 311.

is not altogether blinded by professional or by political prejudices. I was more particularly interested in that part of your argument where you combat Paley,¹ whose apology for the existing system I never could read without feelings of indignation. Indeed, I have more than once lost my temper in discussing the merits of that part of his book with some of your countrymen, who were disposed to look up to him as an oracle both in politics and in morals. Your reply to him is, in my opinion, quite unanswerable." A sympathetic response was also accorded by certain sections of the press. To emphasise the difficult task and the courage of Romilly, and to show that his ability and character could not but receive wide recognition, a passage from a leading contemporary paper may be quoted: "A resolute spirit and dauntless courage must be possessed by him who, in these times, travels out of the beaten track in order to rectify established errors, and to reform ancient abuses. No sooner does any man announce intentions of this sort, than he finds himself beset on every side by a clamorous tribe, who decry his motives, who obstruct in every possible way his efforts, and who see or affect to see in every *improvement* a dangerous *innovation*. Such considerations, however, have not deterred the distinguished author of this tract from devoting some of the moments of his scanty leisure to that toilsome and thankless service. Unwelcome as all measures of this nature are to many persons, the professional eminence, the political integrity, the superior talents, and the private virtues of the proposer of them in this instance, as well as the ability with which they are recommended, cannot fail to attract to them a very considerable degree of attention." ²

Romilly fought heroically for his three bills; but he fought a losing battle—the opposing forces were too numerous. On May 1, at the report stage, the bill to abrogate the death penalty for stealing to the amount of forty shillings in a house was taken first. It was opposed as part of an "erroneous" and "dangerous" system. Romilly's reply to Paley had given great offence. "I know," he protested, "that I have been represented as being actuated by very mistaken notions of humanity; and though I certainly do not feel it to be a great reproach to have acted from motives of humanity only, yet I must say that I have never professed such motives, and that in proposing this present bill,"³

¹ For the refutation of Paley, see the next chapter.

² *Monthly Review*, March 1810, p. 308. ³ Viz., stealing in a dwelling-house.

my chief endeavours have been exerted to show that it is one more likely to prevent the commission of crimes, than the existing law which it is intended to supersede, and rest its defence upon grounds of policy and expediency; and the coldest and harshest reasoner upon such subjects is as much bound to support this measure, as those whose generous hearts feel most sensibly the unnecessary sufferings which are inflicted on their fellow-creatures.”¹ The bill was lost, however, by 33 against 31, the majority including twenty-two persons in office. Very few members of the Opposition were present; they wished well to the bill, remarks Romilly, but not well enough to attend.² Canning and Wilberforce voted in its favour. The latter concluded his speech by thanking the “able and eminent lawyer” for his great efforts, and regretted they did not receive more adequate support.³

The bill relating to privately stealing in shops passed the Commons (May 4), and the third bill was postponed. The former failed in the House of Lords at the second reading (May 30), by 31 against 11, the majority including seven prelates, of whom Romilly says: “. . . I would rather be convinced of their servility towards government than that, recollecting the mild doctrines of their religion, they could have come down to the House spontaneously, to vote that transportation for life is not a sufficiently severe punishment for the offence of pilfering what is of five shillings’ value, and that nothing but the blood of the offender can afford an adequate atonement for such a transgression.”⁴ Lord Ellenborough thought, indeed, that transportation was not a sufficient deterrent, that it was considered by delinquents as only “a summer airing by an easy migration to a milder climate”;⁵ he doubted whether the judges had not erred by too much lenity. Others argued about the dangers of innovation, and said picking pockets had increased since the death penalty for it had been removed. It was, in fact, the number of prosecutions that had increased; for before many had refrained from taking proceedings.

The following session Romilly got leave (February 21, 1811) to bring in the same three bills, and assured the House that his desire to alter the law was not due to light motives or fanciful notions of benevolence; that it sprang from a long-established conviction that the mitigation of our severe penal code would

¹ *Speeches*, vol. i, p. 238. ² *Memoirs*, vol. ii, p. 323. ³ *Ibid.*, p. 323, note.

⁴ *Ibid.*, p. 331.

⁵ *Ibid.*, p. 334.

advance the humanity and justice of our country and the well-being of our fellow-creatures.¹ He expressed his determination to go on with his policy in spite of the great amount of time he had already spent on the subject without doing much good.² "I know," he avowed, "that my motives must occasionally be misunderstood by some, and might, possibly, be misrepresented by others. I was not blind to the road where prudence pointed to preferment; but I am not to be misled from comforts which no external honours can bestow."³ On March 29, he moved the second reading of the bill as to theft in a dwelling-house, and in his reply to hostile members—of whom one said that his "errors" and "illusions" were due to a work of Bentham—he observed: ". . . If by the debate of this night any gentleman is induced to read Mr. Bentham's work,⁴ my honourable friend may enjoy the consciousness that he has not laboured in vain; it is not to be expected that such a publication can at once become popular. We may be too near the object to see it distinctly; but by the exertion of Mr. Dumont, second only to Mr. Bentham, it has been translated and extensively circulated on the Continent; and in future times, when we and our differences are alike forgotten in the grave, this acquisition to English philosophy will be claimed, and its merits duly appreciated, by this country."⁵ Eventually, these three bills, together with two others relating to stealing from bleaching-grounds (which he had also introduced in the meantime), were passed in the House of Commons (April 8, 1811); but in the Lords the former three were thrown out, though the latter two were successful. (These are 51 Geo. III, cc. 39 and 41.)

After the assembling of the new House of Commons, Romilly once more (January 17, 1813) moved for leave to bring in his Shoplifting Bill. He purposely omitted the two others, as to stealing in houses and on vessels, because they had before excited the greatest opposition. At the end of March, the former passed the third reading, after he had vigorously refuted the same old objections; but it was thrown out in the Lords on the second reading (April 2). Again on February 16, 1816, he obtained leave to bring in the same bill, and pointed out the fallacious arguments used against it by opponents in the Upper House. On March 15 it was read a third time and passed. Being anxious to learn whether the Lords were now more favourably disposed towards

¹ *Speeches*, vol. i, p. 317. ² *Memoirs*, vol. ii, p. 369. ³ *Speeches*, vol. i, p. 317.

⁴ His *Treatise on Legislation*; cf. *supra*, the essay on Bentham.

⁵ *Speeches*, vol. i, p. 342.

the project, he saw Lord Stanhope who, emphasising his hostility, declared that "it was a bill to screen the greatest villains upon the face of the earth, men who were much worse than murderers," and went on to explain his meaning in an extraordinarily inapposite and irrelevant manner.¹ Romilly could expect little after such a pronouncement; and the bill was rejected in the Lords without a division (May 22). However, Romilly's untiring efforts, exposition of principles, and constant appeal to reason bore some fruit even in the Upper House; for, on the rejection of the bill, a protest (reproducing his arguments), signed by the Duke of Sussex, the Duke of Gloucester, Lord Lansdowne, and Lord Holland, was entered on the Journals of the House of Lords, to the following effect: "Dissentient.—1st, Because the statute proposed to be repealed appears to us unreasonably severe, inasmuch as it punishes with death the offence of stealing property to a very inconsiderable amount, without violence, or any other aggravation. 2dly, Because, to assign the same punishment for heinous crimes and slight offences tends to confound the notions of right and wrong, to diminish the horror atrocious guilt ought always to inspire, and to weaken the reverence in which it is desirable that the laws of the country should be held. 3dly, Because severe laws are, in our judgment, more likely to produce a deviation from the strict execution of justice than to deter individuals from the commission of crimes; and our apprehension that such may be the effect is confirmed, in this instance, by the reflection that the offence in question is become more frequent, and the punishment, probably on account of its rigour, is seldom or never inflicted. 4thly, Because the value of money has decreased since the reign of King William, and the statute is, consequently, become a law of much greater severity than the legislature which passed it ever intended to enact." ²

Let us now go back a few years to see what other measures of amelioration Romilly attempted, and how he fought unceasingly for reason and liberty. On April 5, 1810, he defended, against a majority including the lawyers in the House and many of his most valued friends, Sir Francis Burdett's view (expressed in Cobbett's *Weekly Register*) that the House had no power to commit for publishing animadversions on its proceedings, or on the conduct of its members, in matters which were concluded.

¹ *Memoirs*, vol. iii, p. 238.

² *Ibid.*, pp. 247, 248.

He thought that such criticisms and censures ought to be left to the ordinary courts; "otherwise the House makes itself accuser, judge, and party, and the accused has no opportunity of being heard, is deprived of a trial by his peers, cannot have counsel to plead for him, and there is no appeal from the judgment against him." Replying to the contention of an opponent who mentioned precedents, he insisted that isolated instances did not establish a law; else, the House might revive certain barbarous punishments it had once inflicted.¹ Burdett having determined to resist the order made against him, his house was broken open, and he was carried by force to the Tower under a strong military escort. On their return, the soldiers were insulted; they fired on the people and killed several.² Next, Romilly moved—unsuccessfully—that J. Gale Jones, a radical orator, who had originally published the resolution censuring the House for excluding strangers, should be discharged from his imprisonment. Opponents said that, by the practice of the House, a person imprisoned for a breach of privilege must petition the House for his release, acknowledge the justice of the sentence, and express contrition for his offence. To this Romilly replied that it was an unjust practice to compel a man to profess publicly that which may be against his conscience, which debases him in his own estimation, and makes him an instrument of his own disgrace.³ In a subsequent discussion he agreed that the privilege of parliament is part of the law of the land, and is to be administered only by parliament; but he maintained that the courts have a right to determine whether a particular case is one of privilege, and that the House cannot call what it pleases breach of privilege.⁴ Soon after (May 24) Romilly, together with Lord Erskine and Whitbread, received votes of thanks from the City of London, and other public bodies, "for their able, constitutional, and independent conduct on all occasions; and particularly for the stand they have lately made, in favour of the dominion of the law, against arbitrary discretion and undefined privilege."⁵

On May 9, 1810, he moved that the acts of George III for erecting penitentiaries should be carried into effect;⁶ and pointed out the evils of transportation, and of promiscuous imprisonment

¹ *Memoirs*, vol. ii, pp. 314–317; *Speeches*, vol. i, pp. 203–228.

² *Memoirs*, vol. ii, p. 318.

³ *Ibid.*, pp. 319, 320; *Speeches*, vol. i, pp. 228–236.

⁴ *Memoirs*, vol. ii, p. 327.

⁵ *Ibid.*, p. 330.

⁶ See *supra*, essay on Bentham, chap. ii, *in fin.*, on prisons.

on the hulks and in common gaols. He was requested to withdraw the motion for some time. After waiting nearly a month, he renewed it, but was once more asked to postpone it, and to move the next session for the appointment of a committee to inquire into the subject of imprisonment. It was said that the objections to transportation or to the hulks were not such as called for so much precipitancy.¹ Romilly persevered in his motion, which was lost.

The following March we find him supporting a motion for appointing a committee to inquire into the delay in the hearing of causes in the House of Lords and the Court of Chancery. He was afterwards (June 5) nominated a member of this committee. On another occasion (February 26, 1812) when it was suggested to appoint a committee to investigate the causes delaying the decision of Chancery suits, he opposed the inclusion of masters in Chancery, as they themselves might possibly be implicated.

He opposed and secured the rejection of the Spilsby Poor Bill (March 19, 1811), because of certain penal clauses empowering the master of the poor-house to inflict excessive punishments, including corporal, and to treat inmates and others in a rigorous manner. No other member appears to have been aware of the existence of such clauses. In the case of the Stroud Poor Bill (March 13, 1812), he showed the evils of passing local poor bills, which established different poor laws and criminal provisions in parishes. He objected to a bill for the relief of insolvent debtors (July 24, 1811) because of the unjust interference of an *ex post facto* law with existing contracts. On a motion for a committee to inquire into the state of the inferior ecclesiastical courts, he argued against the power of excommunication exercised by the spiritual courts, and urged that a bill should be brought in to take away the power. (Such a bill was introduced, and became law in the next parliament, July 1813.)

On February 7, 1812, Romilly moved for and obtained leave to bring in a bill to repeal the statute of Elizabeth which imposed capital punishment on soldiers or seamen found vagrant and begging without their passes. It was passed a few weeks later (52 Geo. III, c. 31). Next, he obtained the appointment of a committee (February 12) to inquire into the manner in which sentences of transportation were executed, and into the effects

¹ Cf. essay on Bentham, chap. ii, *in fin.*, for the actual conditions.

produced by that mode of punishment. Along with only seven other members, including Whitbread, he supported Burdett's amendment to the Mutiny Bill (March 13), for the abolition of flogging in the army; he vindicated his friend Brougham, who had been attacked for saying that for very serious offences it would be better to shoot soldiers than to flog them; and he proved his contention by giving certain indisputable facts of an appalling character.¹

In order to correct the abuses of charitable trusts, he prepared a bill, which passed March 20, 1812 (52 Geo. III, c. 101).

He supported a proposal (April 24, 1812) to remove the disabilities imposed on Catholics, and all persons dissenting from the established church; he voted for a bill (May 4) to abolish many sinecure places; and spoke (May 8) in favour of parliamentary reform.

Soon afterwards he presented a petition (May 30) on behalf of one who had been severely treated for debt; and secured the appointment of a committee (June 25), of which he was a member, to inquire into the condition and treatment of prisoners confined in the castle of Lincoln. Further, he favoured (June 19), in a minority, a bill to prevent the registrar of the Court of Admiralty from using, for his own benefit, suitors' money; and was against one to create the office of Vice-Chancellor, on the ground that there were other means of relieving the Chancellor of some of his duties. In December he issued an anonymous pamphlet, *Objections to the project of creating a Vice-Chancellor of England*; but he avowed the publication and sent copies to the Chancellor and to the promoter (Lord Redesdale), whose reply called forth Romilly's rejoinder, *A Letter to a noble Lord* (February 1813). The bill passed its third reading (March 11). Romilly in vain spoke against it, saying: "There is the greatest reason to apprehend that, from this time forward, the office of Lord Chancellor will be much more a political than a judicial office."²

On October 6 and the following days the Bristol election was held. He had been invited at the beginning of the year to stand for that city, and consented on condition that he would not have to canvass or make elaborate professions of political belief, and the policy he would pursue either as a private member of parliament or as a minister. The following passage from his address to the electors will undoubtedly be read with interest and plea-

¹ *Memoirs*, vol. iii, pp. 18, 19. See *infra*, chap. ii.

² *Ibid.*, p. 87.

sure: "It has been usual for persons who stand in the situation of candidates to make professions of their political opinions, and to give promises of their future conduct; and this is undoubtedly proper in those who have not yet been tried, and who have no past conduct to refer to; because with such persons what is it you can have to trust to but the professions which they make, and their private characters, which afford you security for the sincerity of those professions? But with those whose public life is already before you, such professions and promises can be of little avail; for either they are consistent with what they have already done, and then they are unnecessary, or at variance with it, and in that case they are entitled to no credit. I shall, therefore, on this occasion, neither promise nor profess, nor shall I presume to remind you of what I have attempted to do; but I may with propriety tell you what are the qualifications which, in my opinion, you ought, at the present crisis, to look for in a representative. He ought to be a man firmly attached to the principles of our Constitution which were established at the Revolution, and which have seated and maintained the present royal family on the throne. He should justly appreciate, and be ready at all times to maintain, the liberty of the press and the trial by jury, which are the great securities for all our other liberties. He should be a sincere friend to peace, and anxious to seize on every opportunity of securing all the blessings which it must bring with it, whenever there is a prospect that it can be permanently obtained. He ought to be determined, whenever the men with whose political principles he in general agrees, and with whom he therefore generally acts, propose or support measures which, in his conscience, he disapproves, to oppose them just as if they were the measures of his political adversaries. He should be an enemy to that influence of the Crown and of the ministers of the Crown which has been so fatally exercised in the House of Commons, and consequently a friend to parliamentary reform. He should be a constant advocate for economy in the public expenditure, and a determined enemy to corruption and peculation; and if he thinks he discovers them in persons of the highest rank, he should not be deterred from censuring and arraigning them by any apprehension that by so doing he may incur their high displeasure, and blast for ever all the prospects of honourable ambition in which he may at some time have indulged. He should be ready, when he sees evils

arising from any of our present institutions, to inquire into the causes of them, and to suggest a remedy, notwithstanding the reproach of being an innovator which he may incur from those who have an interest in perpetuating abuses; and, above all, he should be a man incapable of being swerved from his duty by the threats of power, the allurements of the great, the temptations of private interest, or even the seduction of popular favour; and who should constantly recollect that all the toil, the pain, and the fatigue of his office must be his own, and all the advantages which are to result from his labours must be for the public. These are the qualifications which, in my opinion, you ought to look for in your representatives. Perhaps it is not prudent in me to state them. Perhaps in this enumeration I have been pronouncing my own condemnation; and in pointing out to you what is requisite in a member of parliament, I have only been reminding you of what is wanting in myself. Of this you are the judges; but, whatever be the consequence, I shall rejoice in what I have done; for this I can with perfect sincerity declare, that I may be elected by you is only the second wish of my heart. The first is, that Bristol and other places of popular election may send to parliament able, honest, disinterested, and patriotic members. Gentlemen, amongst the qualifications which are, in my opinion, requisite in a member of parliament, I have not said that he should be determined, under no circumstances, to accept an office under the Crown. I have not said so, because that is so far from being my opinion, that I think there are circumstances in which it may be his duty to accept such an office. I should be sorry to be misunderstood by you upon this subject, and I am glad of this opportunity of avowing what my opinion upon it is; and, indeed, in appealing to my past conduct, I have told you that was my opinion, since I formerly myself held an office under the Crown. If a man barter his principles for office, if in office he acts upon different grounds from those which he professed to act upon before he obtained it, and if his official conduct is a constant violation of those rules which he had, when in opposition, prescribed for others, there are no terms which, in my opinion, are too strong or too severe to stigmatise such political apostasy; but if in office his views and his principles are the same as when he was in a private station, he deserves, in my opinion, no reproach for accepting it; and if it be, as I conceive it is, the duty of every man to use all the means which

he possesses of being useful to his fellow-citizens and his fellow-creatures; and if, by accepting office, he may become eminently useful to them, it is his duty to accept it. In enumerating what is in my opinion requisite in a member of parliament, I have omitted to say that he ought to be a friend to toleration, and an advocate for religious liberty to persons of all persuasions, but more especially to all descriptions of Christians, and that he ought to be a zealous supporter of that which is I think truly called Catholic emancipation, as being of vital importance to the security and happiness of this country, and which consists only in removing disabilities and disqualifications to which the great majority of the people of Ireland are subject, only for professing and adhering to that religion in which they sincerely believe, and in which they have been brought up by their fathers." ¹

On the eighth day of the election, Romilly, seeing the numbers against him, retired from the contest, without condescending to take any notice of the "many very mean election tricks" that had been practised against him by his opponents' supporters. A few days later he wrote to the Mayor of Bristol: "From your friendship and kindness to me, you will, I am sure, be glad to learn that I have found here [Eastbourne] Lady Romilly and all my children in perfect health, and that I am at this moment surrounded by countenances as happy and as much delighted as they could have been if I had returned covered with the laurels of Bristol." ²

In November the Duke of Norfolk offered Romilly a seat in parliament, and assured him that he would be left to act and vote as he thought proper. As the purchase of seats had been made illegal by statute, he accepted the offer, and was elected for Arundel (December 21). 1813

No sooner did he take his seat than he moved (along with his motion as to the Shoplifting Bill, already referred to) for leave to bring in bills to alter the punishment of high treason, and to abolish the penalty of corruption of blood. In the former his object was to do away with the horrible disembowelling and quartering; in the latter, to prevent the infliction of suffering on the innocent for the act of the guilty. The solicitor-general, among others, declared his intention to oppose the bills, and gave reasons which showed that he had not considered the subject and had not grasped the mover's aim. On March 17 the 274

¹ *Memoirs*, vol. iii, pp. 56-58.

² *Ibid.*, p. 65.

bills were brought in, and on April 9 the measure to alter the punishment of high treason was discussed; the opposition that had been threatened was duly made. Some opponents confessed, in truth, that they would not have voted for such a severe law originally; but as they found it established, they were against altering it. In the course of his reply to the resistance offered and to an amendment that had been proposed, Romilly observed: "Although in my humble efforts to improve the penal law I have hitherto uniformly experienced opposition, I cannot but confess that I feel some disappointment and much mortification at the resistance to the bill now before us. I had flattered myself that at least in this one instance I should have secured your unanimous concurrence. I certainly did not foresee that in an English House of Commons in the nineteenth century, one voice would have been heard in defence of a law which requires the tearing out of the heart and bowels from the body of a human being, while he is yet alive, and burning them in his sight."¹ And he concluded with the following words, which ought surely to have moved all but those hopelessly afflicted with asinine obstinacy: "I call upon you to remember, that cruel punishments have an inevitable tendency to produce cruelty in the people. It is not by the destruction of tenderness, it is not by exciting revenge, that we can hope to generate virtuous conduct in those who are confided to our care. You may cut out the heart of a sufferer and hold it up to the view of the populace, and you may imagine that you serve the community; but the real effect of such scenes is to torture the compassionate and to harden the obdurate. In times of tranquillity you will not diminish offences by rendering guilt callous, by teaching the subjects to look with indifference upon human suffering; and in times of turbulence fury will retaliate the cruelties which it has been accustomed to behold."²

The bill was none the less lost. Though Romilly's heroic efforts had proved unavailing, his perseverance and courage—which in another man might by this time have been broken—did not in the least falter. In the following session (March 23, 1814), he moved for and obtained leave to bring in the same two bills. In committee amendments were proposed and carried, which secured the retention of corruption of blood and forfeiture in the cases of treason and murder. Romilly, supported by Sir

¹ *Speeches*, vol. i, pp. 461, 462.

² *Ibid.*, pp. 477, 478.

James Mackintosh, held that corruption of blood was not a fit punishment for any crime whatever, as it was destitute of all the properties necessary in a penalty.¹ As to the other bill, an amendment was carried to the effect that the head of the convict, after his execution, should be cut off. Romilly strongly condemned it. "I cannot think," he observed, "that any good effects are produced by the disgusting spectacle which is now exhibited, and which the right honourable gentleman desires to preserve, of holding up the bleeding head of the criminal to the view of the spectators. On the contrary, I believe that the worst effects are produced by it. We are so constituted by nature, that such spectacles of horror are seldom beheld by any persons with impunity."² The bills were returned, with alterations, from the Lords (July 25). The latter proposed to abolish the effects of corruption of blood, except in the case of the attainted person during his life only, and in that of accomplices in murder. Romilly moved that these amendments should be accepted. In the Treason Bill the Lords preserved as part of the sentence that the body of the criminal, after he is dead, should be severed into four quarters. This he opposed, for "such horrible spectacles as that of mangling a body from which the vital spirit had just departed before a crowd of spectators tended only to deprave their minds, and to harden their hearts."³

On May 4, 1813, he prevailed on the House to strike out certain rigorous clauses inserted in a bill for the relief of insolvent debtors (who, though willing to give up all their possessions, could hitherto be kept in perpetual imprisonment by their creditors), e.g. that a debtor giving a false account of his property should be punishable with death, and that the benefit of the measure should be limited to debtors who had already been in prison for six months. "If a debtor is to have the benefit of such a law," argued Romilly, "it is surely desirable that it should be before he has been long enough in prison to have acquired the habits and dispositions and maxims which are learned in those abodes of vice and misery, and while he may yet be restored as a useful member to the community." No other member seems to have been aware of the clause that created another capital offence—"so little account in these matters is made of human life." The bill became law, July 10, but its execution having been delayed,

¹ *Speeches*, vol. ii, pp. 1-4. See *infra*, chap. ii.

² *Memoirs*, vol. iii, p. 147.

³ *Ibid.*, pp. 18, 19.

⁴ *Ibid.*, p. 109.

Romilly presented to the House of Commons petitions from prisoners (November 11, 22).

Next he opposed (November 29), without success, the bill to continue the death penalty for breaking stocking and lace frames, on the ground that the causes which called it forth had already disappeared. He also spoke against the practice of flogging in the army.

The following year he obtained leave (March 31, 1814) to re-introduce a bill (the previous one having failed seven years before) for subjecting the freehold estates of deceased debtors to the payment of their simple contract debts; and it was afterwards carried in the Commons, but thrown out in the Lords.

Romilly now took a conspicuous part in the organisation of a meeting of the slave trade abolitionists (June 17). This produced a great effect on the provinces; and within a month over eight hundred petitions were presented to parliament against the slave trade. He also actively interested himself in the position and fate of Norway and Poland.

A motion for a commission to inquire into the fees taken in the courts was supported by him (June 28); he pointed out that illegal fees had been taken in the Court of Chancery for expediting causes. Soon afterwards he opposed, in a minority, Peel's Irish Insurrection Bill, which was to give magistrates in Ireland extraordinary powers, and pointed out there was no evidence of the facts stated as the grounds for bringing in the measure.

In reference to a motion before the House of Commons (November 28, 1814), he condemned the unconstitutional practice of continuing the embodiment of the militia in a time of peace; and moved a similar resolution the following year, when it was again rejected. He voted, in a minority, against the Corn Bill (March 3, 1815), as being "an extremely injudicious and impolitic measure," which indeed provoked riots immediately afterwards. At his instance a bill was introduced and passed (55 Geo. III, c. 49), providing for the issue of returns of criminals. His vigilance and energies never flagged in his anxiety to prevent irregularities and injustice and to promote liberty. He drew the attention of the House to cases of excessive punishment (April 17), moved or supported resolutions for appointing committees to inquire into the cruel conduct of colonial governors (June 2, 1815-June 11, 1816), urged the restriction of military punishments (June 21), supported

a bill to abolish the pillory (April 21)—which was rejected in the Lords at the instance of Lord Ellenborough—objected to heavy stamp duties proposed to be laid on law proceedings (May 22), favoured the removal of Catholic disabilities (May 30), emphasised that the intemperate conduct of a few members of the Catholic Board could not alter the claims of the whole body, and advocated the extension of trial by jury to civil cases in Scotland (April 12).

It is a relief now to record the agreeable interlude, during the summer vacation, of a continental tour—including Switzerland, Italy, and France. His reflections throw, of course, as much light on himself as on the places visited. Of Geneva he says: "The society of Geneva, I own, a little disappointed me; they have a great deal of literature and of science, but still their conversation seems rather too much confined to the trifling topics which generally occupy the attention of a provincial town; and cards for the old, and dancing for the young, are the never-failing substitutes for conversation."¹ Elsewhere he complains that he cannot find a single bookseller—a complaint that will touch the hearts of all lovers of books: "The Valais did not appear to me, from the little I could learn and observe in rapidly passing through it, to be that seat of happiness and innocence which Rousseau and other writers have represented it. The Government is severe and tyrannical, and the people ignorant in the extreme. In the whole state there is not a single bookseller, not even at Sion, the capital."² He is captivated by the natural attractions of Genoa, but does not forget its political situation: "I was enchanted with the beauty of Genoa. Its port, its lighthouse, its palaces and churches, and public edifices, the adjoining hills studded with villas, and the fine mountains of the Apennines behind them, form altogether a scene more striking and beautiful than any that I had ever before beheld. It is impossible, however, to see this magnificent city, filled as it is with the monuments of its ancient prosperity and renown, and to behold the fine race of inhabitants that crowd its streets, without feeling the most lively indignation against the base and unprincipled policy of England and the other great powers of Europe, who have lately taken on themselves to deliver over this whole state, with all its territory, into the hands of a narrow-minded and bigoted prince, a stranger to them, disliked and despised by them, and who never had any pretensions to aspire

¹ *Memoirs*, vol. iii, pp. 203, 204.

² *Ibid.*, p. 205.

to dominion over them." ¹ In Paris he met again many old friends, including Lafayette and La Rochefoucauld.

Back again in Westminster, his vigorous activity was resumed. He got leave once more (February 7, 1816) to bring in a bill to subject the freehold estates of deceased debtors to the payment of their simple contract debts, and showed the futility of the objections raised in the previous session in the Lords. Once more it was thrown out in the Upper House (June 19), and Lord Grey entered a protest drawn up by the promoter.² (Romilly's project was, however, realised in a later parliament, 3 and 4 Will. IV, c. 104.)

On May 23 he ably and eloquently vindicated, in the House of Commons, the cause of the persecuted Protestants in the south of France. For his defence of religious liberty many attacks were made on him in the press; and the lampooners of the day could, apparently, do no better than make stupid reflections on his ancestry:

Pray, tell us why, without his fees,
He thus defends the refugees,
And lauds the outcasts of society?
Good man! he's moved by filial piety.³

Then he, along with Brougham, protested against the ill-treatment of slaves in Barbadoes (June 19). A week later he gave evidence before a committee of the House of Commons appointed to inquire into the state of the metropolitan police, and confuted, by means of a number of incontrovertible facts, the fallacious statement that felonies had increased owing to the abolition of capital punishment for picking pockets.⁴ In the case of a bill making it a capital felony for persons riotously assembled to destroy machinery used in collieries, he observes: "The offence is already by a former statute a felony punishable with transportation. That this severity has not been sufficiently efficacious; that the crime is in any degree increasing; that any remarkable instance of it has of late occurred, was not stated by anyone. But, as if the life of man was of so little account with us, that anyone might at his pleasure add to the long list of capital crimes which disgrace our statute books, the bill passed through all its stages as matter of course, without a single statement or inquiry or remark being made by anyone." ⁵

¹ *Memoirs*, vol. iii, pp. 206, 207.

² *Ibid.*, p. 253.

³ This was the brilliant effort of the *Courier*, May 29, 1816.

⁴ *Memoirs*, vol. iii, p. 259.

⁵ *Ibid.*, p. 260.

The following year (February 12, 1817) he moved for and obtained leave to introduce a bill to repeal an act (56 Geo. III, c. 130) imposing on poachers the excessive penalty of seven years' transportation; he pointed out that such extreme rigour for an offence of this kind was without example in any other country, and besides that the preamble and the enacting part of the act were inconsistent. ". . . I am by no means," he observed, "insensible to the sad effects of poaching, to the idle and profligate habits which it seldom fails to produce. The frequent acts of rapine and atrocity, which have been committed of late years by persons pursuing this lawless occupation, are notorious; but is it by means like these, by indiscriminate and unmeasured severity, that the evil will be repressed? No, such punishments tend only to defeat the object for which they are enacted, by rendering offenders more desperate, and by turning public opinion rather against the law than against the offence."¹

Next he opposed (February 27) the Habeas Corpus Suspension Bill, which he regarded as the most important question discussed since he had a seat in parliament. He urged that the state of the country did not demand such an extraordinary measure, that the proposed remedy was not at all adapted to the existing evil, and that other means were available. He pointed out that when the act was suspended on previous occasions (e.g. 1794, 1798, 1801), the state of affairs was different, there were grounds for apprehension. "The country was in a state of actual war, or actual rebellion, or both. External danger was aggravated by internal co-operation. The fears of an invasion from France were heightened by the rage of disaffection in England, and of open rebellion in Ireland."² "How," he went on to ask, "can this suspension be useful, unless, indeed, our Government shall follow the example of one which it has recently supported against the avowed wishes of the people, where not merely obnoxious individuals, but the inhabitants of whole villages and towns, have been thrown into dungeons?"³ The bill having become law, he supported a motion (which was lost) "for the purpose of reprobating the illegal and unconstitutional doctrine contended for by the attorney- and solicitor-general, that the Crown, by committing men to prison charged with treason, or on suspicion of treason, might prevent any magistrates having access to them; notwithstanding that, by the statute

¹ *Speeches*, vol. ii, p. 150.

² *Ibid.*, p. 160.

³ *Ibid.*, p. 162.

31 Geo. III [c. 46], magistrates are expressly authorised to visit gaols, for the purpose of detecting and reporting to the Sessions abuses which they may discover.”¹ What was the prohibition of the Secretary of State but dispensing with the laws of the land? To the astonishing contention of the attorney-general that, though the statute gave the magistrates a right to visit prisons, it did not allow any communication with the prisoners, the obvious reply was: “How could the magistrates perform the duty imposed on them by law—the duty of preventing all abuses of authority—but by seeing and communicating with the prisoners in their dungeons?”² Again, he resisted, in the face of a large majority, the Seditious Meetings Bill (March 4). He reminded the House that the measure was contrary to the spirit of the constitution, that it would provoke and inflame the public mind rather than calm it, that the advantages of public expression of opinion on public men and public affairs were incalculable. “Restrain this privilege,” said he, “and you at once weaken or destroy a source of that glorious freedom, of that high spirit, and of that just reverence for the laws and institutions of their country, which have ever been amongst the noblest characteristics of Englishmen.”³

Attacking the system of lotteries (March 18, 1817), he “endeavoured to make the moral and pious Chancellor of the Exchequer sensible of the wickedness of this measure of finance, which he annually with such complacency resorts to.”⁴ Afterwards he supported a motion for a committee to inquire into the representation; he pointed out that the bankrupt laws, by their very severity, defeated themselves; he opposed the continuance of the rigorous Irish Insurrection Act, on the ground that such a severe measure was unjustifiable save for reasons of absolute necessity, and that more was required than the bare statement of the Irish Secretary to prove that necessity; he objected to the clause of a Copyright Bill, which compelled authors to give free copies of their works to certain public bodies, as “a most unjustifiable tax on literature”;⁵ he submitted motions (June 25) condemning the circular letter of Lord Sidmouth, the Home Secretary,

¹ *Memoirs*, vol. iii, p. 299.

² *Speeches*, vol. ii, p. 211.

³ *Ibid.*, pp. 170, 171.

⁴ *Memoirs*, vol. iii, p. 283. Lotteries were abolished in 1823, by the act 4 Geo. IV, c. 60; and later the advertising of foreign or other lotteries was declared illegal by 6 and 7 Will. IV, c. 66.

⁵ *Memoirs*, vol. iii, pp. 300, 301.

on the ground that ministers ought not to declare the law to magistrates. The letter requested the lords lieutenant to communicate to the magistrates the opinion of the law officers of the Crown on the law of libels, and the direction of the Government as to their conduct in such cases. Romilly not only contested the law thus laid down (relating to the arrest of persons charged with libel), but urged that the ministerial interference with the execution of the law is contrary to the principles of the constitution, and is inconsistent with the pure administration of justice.¹ "This unprecedented and unconstitutional recommendation," he went on to say, "is given with respect to a discretion which ought, even where it avowedly exists, to be exercised but very rarely and upon very extraordinary occasions. . . . Is this the way in which the law of the land is in doubtful cases to be expounded? Is the unsupported opinion of an attorney- and solicitor-general to sanction the exercise of so unusual and dangerous a power? If the Crown can by its officers do so, if it can thus declare *what* is law, the Crown is in itself equal to the whole legislature of King, Lords, and Commons. By the constitution of this country there are only two modes in which the law can, in doubtful matters, be established. The one is by a declaratory act of the legislature, the other is by the regular and solemn decisions of the judges." ■

Romilly concluded the session's work by getting through both Houses (July 9) a bill to continue the act 51 Geo. III, c. 124, preventing arrests on mesne process for debts less than £15.

On July 12, 1817, parliament was prorogued. Romilly suffered much disappointment through his abortive legislative efforts and fruitless resistance to harmful measures, as well as a great loss by the death of such valued colleagues as Horner and Whitbread. At one time he had hopes indeed that he might be appointed Lord Chancellor; but now he had given up all such ambition. A compensation, however, for vain endeavours and foiled expectations was found, invariably, in his happy domestic life; and a year before the death of his wife, he recalls—ominous prognostication!—how he first met her, and reflects, with contentment and joy, on their devoted attachment to each other. "The happiness of my present condition," he observes, "cannot be increased: it may be essentially impaired. I am at the present moment completely independent both of the favours and of the

¹ *Speeches*, vol. ii, p. 230.

² *Ibid.*, p. 235.

frowns of Government. . . . The labours of my profession, great as they are, yet leave me some leisure both for domestic and even for literary enjoyments. In those enjoyments, in the retirement of my study, in the bosom of my family, in the affection of my relations, in the kindness of my friends, in the good-will of my fellow-citizens, in the uncourted popularity which I know that I enjoy, I find all the good that human life can supply; and I am not, whatever others may think of me, so blinded by a preposterous ambition as to wish to change, or even to risk,

These sacred and homefelt delights,
This sober certainty of waking bliss,

for the pomp, and parade, and splendid restraints of office; for the homage and applause of devoted but interested dependants; for that admiration which the splendour of a high station, by whomsoever possessed, is always certain to command; and for a much larger, but a precarious, income, which must bring with it the necessity of a much larger expense. The highest office and the greatest dignity that the Crown has to bestow might make me miserable: it is impossible that it could render me happier than I already am.”¹

In the November issue of the *Edinburgh Review* (1817), Romilly published an article on Bentham’s *Papers relative to Codification and Public Instruction*, in which he emphasised the disadvantages of unwritten law, spoke of Bentham with respect and admiration, but without disguising what were conceived to be his faults; and fully conscious of the master’s sensitiveness to criticism, he expressed a hope that the strictures thus made would not cause any offence.² The observations must have offended Bentham, however, as we shall see presently.

The remainder of his parliamentary career, resumed with undiminished assiduity, may soon be told. His attempt to revoke the death penalty for shoplifting (February 25, 1818) has already been mentioned. He opposed—as usual, in vain—the Indemnity Bill (March 11), because its object, unlike that of ordinary Indemnity Bills, was, “in many cases, to annihilate rights of individuals, to rob the injured and oppressed of every remedy, to put them out of the pale of English law”; and because it was to operate not only in the case of occurrences under the Suspension Act, but also in that of abuses of authority extending

¹ *Memoirs*, vol. iii, pp. 310, 311.

² *Ibid.*, p. 324.

over a long period.¹ He added that the first object of government, and the foundation of its whole fabric, is the rendering of justice to the oppressed; and he asked whether the wrongs inflicted on certain victims of ministerial action are to remain unredressed. "Do the gentlemen opposite imagine," he exclaimed, "that because they can suspend the laws of this country, they can suspend the laws of nature?"² Further, he brought to the notice of the House cases of horrible treatment of slaves in the West Indies, and insisted on the appointment of a committee of inquiry. "No man," he observed, "can venture to write in defence of the negroes without exposing himself to a prosecution; for all the severities and cruelties to which they are subjected are to be traced to the injustice of their legislatures and tribunals."³ He also denounced the cruelty of the game laws (May 18), and demanded, in vain, an investigation into cases of unwarrantable interference with the security of subjects and the liberty of the press (May 21). He reprobated the fettering of men charged with publishing a libel; for they had not committed felony, and, even if they had, they had not been legally convicted. He expressed amazement at the tenour of the attorney-general's admission "that the magistrates had, in some degree, exceeded their authority." "Was it not notorious," he asked, "that many persons construed every publication, offensive to the feelings of men in power, a libel? . . . The houses of the petitioners had been searched for papers, and papers called libels had been seized and taken away. Rollin's *Ancient History*, Law's *Serious Call*, and the *Evangelical Magazine* had been seized, because they were in company with the *Liverpool Mercury* and some of Cobbett's *Registers*. Such proceedings were most reprehensible."⁴

In view of the expected dissolution of parliament, an offer came to Romilly (June 8) from Westminster, undertaking to return him without trouble or expense on his part, and requiring from him no pledge whatever. He replied that he would accept the honour if he were elected without his interference, and without having to offer himself as a candidate or do anything to secure his return. The election began June 18 and ended July 4, with Romilly at the head of the poll. Here we have to record—with regret—an act of Bentham, done undoubtedly with sincerity, but ungenerously when directed against an old friend like

¹ *Speeches*, vol. ii, p. 331.

² *Memoirs*, vol. iii, p. 339.

³ *Ibid.*, pp. 352, 353.

⁴ *Speeches*, vol. ii, pp. 412-414.

Romilly. "Among the strange incidents which occurred during the election," says Romilly, "was the decided part which my excellent friend, Jeremy Bentham, took against me. He did not vote, indeed; but he wrote a handbill, avowed and signed by him, in which he represented me to be a most unfit member for Westminster, as being a lawyer, a whig, and a friend only to moderate reform. This handbill he sent to Burdett's¹ committee; but as it did not reach them till after they had become sensible that they had injured their cause by their abuse of me, they refused to publish it. Some of my friends were very angry with Bentham for this hostile interference against me. For myself, I feel not the least resentment at it. Though a late, I know him to be a very sincere, convert to the expediency of universal suffrage; and he is too honest in his politics to suffer them to be influenced by any considerations of private friendship."² Romilly was true to his word. He bore his old friend no ill-will for this antagonistic intervention, and dined with him a month later, in the company of Brougham, Dumont, James Mill, Rush, the American minister, and others.

Romilly made his last appearance in parliament on its re-assembling, and resisted the government Bill of Indemnity, and the continuance of the Alien Act, empowering ministers to banish foreigners who were suspected of hostile intrigue.

On September 5, 1818, he writes in his journal that although his strength and activity are undiminished, his prospects of attaining the office of Lord Chancellor have lessened. "A few years more of active life with unimpaired faculties is the utmost I can hope for."³ He says he has awoke from his former splendid dreams, he has realised that the political principles professed by him, and with which he will go down to his grave, will for ever exclude him from royal favour. None the less, he is determined to do his utmost; if he cannot carry his cherished measures, he will resist what is pernicious, and act honestly and independently. He recognises that his election to an important constituency like that of Westminster has increased his means of being useful, but he sees that it has brought also certain difficulties—an expected obligation "to maintain more strenuously than ever the claims and pretensions of the people," and to pay his court to them. He is resolved, however, not to be their slave, even if

¹ Burdett was one of the candidates; and in the result was second.

² *Memoirs*, vol. iii, p. 365.

³ *Ibid.*, p. 410.

he be their servant.¹ But whatever hopes and expectations he still cherished were crushed in a tragically sudden manner.

On October 29, 1818, his wife, who had been ill for several weeks, died at Cowes. To him this was the one irreparable calamity, the one unbearable affliction. He shut himself up in his house in Russell Square; and, four days after her death, he cut his throat with a razor (November 2). He survived only about an hour. At the inquest a verdict was returned of suicide during temporary derangement. Dumont, in his evidence,² stated that the protracted illness of Lady Romilly had weighed heavily on her husband's mind, that he had been in a state of constant anxiety, and had appeared to have lost all hope of her recovery. "When Lady Romilly had a relapse," said Dumont, "nothing could equal the excruciating pain of Sir Samuel, but his fortitude and resignation. He was almost entirely deprived of sleep for about six weeks. . . . Twice or three times he himself expressed to me his fears of mental derangement. . . . Some conversation about his children generally restored a certain degree of peace to his mind. . . . Two days before the death of Lady Romilly . . . he complained to me of a most tormenting and burning heat in his head." A day or two after her death, "he appeared to me in the state of a man dying from an internal wound." "I never could have imagined it possible that his invaluable life would have been terminated by such means, from the intimate knowledge which I had of his high principles of duty, of his moral and religious fortitude, of his love for his country, of his parental affection." Lady Romilly's remains had already been removed to Knill, and her funeral was delayed until the arrival of her husband's body; so that on November 11 they were buried together in the parish church.

Romilly had six sons and a daughter. His second son, John (1802-1874), was educated at Trinity College, Cambridge, and called to the bar at Gray's Inn, 1827, of which he was afterwards a bencher. In 1832 he was a member of parliament for Bridport, and in 1847 for Devonport. He had a successful career at the Chancery bar. In 1843 he was made a queen's counsel; then solicitor-general (1848), and attorney-general (1850), in which capacity he carried through several civil law reforms that had been attempted by his father. In 1851 he became Master of the Rolls, and in 1865 was raised to the peerage as Baron Romilly.

¹ *Ibid.*, p. 412.

² *Morning Chronicle*, November 3, 1818.

CHAPTER II

ROMILLY'S PRINCIPLES OF CRIMINAL LAW, AND VIEWS AS TO ITS REFORM

IN the preceding brief chronicle of Romilly's life, and work in parliament, we have seen what great efforts he made to mitigate the rigour of the penal code, to harmonise it in accordance with more rational conceptions, to regularise criminal law procedure and administration, and, generally, to break down the barrier of prejudice and bigotry erected by his contemporaries, to show the folly and evil of their unreasoning adoration of the system—chaos, rather—established by their ancestors of blessed memory. The immediate legislative results were not, of course, commensurate with Romilly's efforts. But his pioneer work did much to wean his countrymen from their arrant obstinacy, and unrelenting hostility to reform, and to prepare the way for comprehensive measures of amelioration. His work in parliament had been, no doubt, facilitated a good deal by the rapid succession of Bentham's books and pamphlets, which, despite unfavourable circumstances, could not but make a deep impression on the minds of many people. Romilly often acknowledged his indebtedness to the teaching of the literary "hermit," emphasised his inestimable services in setting penal legislation on a scientific basis, and, over and above all this, was devoted to him to the degree of fraternal affection. He had taken the precious manuscripts of Bentham to Dumont, had assisted in the publication of several writings, had helped considerably to diffuse many of the views expounded in them. But perfect accord between Romilly and Bentham there was not. Romilly's moderation and circumspection could scarcely be in harmony with Bentham's uncompromising radicalism. Romilly had a greater experience of men, and recognised that the citadel of tradition, held by overwhelming numbers, if it were to be taken at all, should be assailed warily, cautiously, step by step; that the attacking forces should be content with small results gradually won, and make sure of every operation and every inch of the ground until the ultimate achievement of complete victory.

Bentham, with far less experience of the world, thought that merely to point out error and folly, by means of a few sweeps of the pen, would suffice to make the powers that were at once destroy the heritage of their forefathers, and alter their ways. Moreover, it is important to bear in mind that Bentham, the writer, had the latitude and tranquillity of a study to construct his schemes in; Romilly, the parliamentarian, had the difficulties of a senate-house, the tempers of passionate men to contend with. In addition to the influence of Bentham, Romilly acknowledged too that of Beccaria, who in a few masterly lines had laid down permanently some of the fundamental principles relating to crimes and punishments. We shall see, then, that the principles enunciated by Romilly in his slight publications, and in his speeches in parliament, reveal a close kinship with the views of the Italian writer, and those of the most eminent English law reformer.

Before setting forth Romilly's penal doctrines and views as to criminal law reform, it will be well to present the views on the subject expressed by two predecessors—one a man of eminence who exerted a great influence on the thought of his country; the other an author of a small tract, which would certainly have sunk into oblivion, had it not been for the sinister influence it exercised for some time on judicial practice. Paley's chapter on criminal law,¹ and Madan's publication,² provoked Romilly's cogent criticism, which to the minds of all but those who were hopelessly blind, obtuse, or stubborn—they formed, alas! the majority—effectually disposed of the specious, but fallacious, arguments advanced in those writings. There were, of course, many truths in them—a circumstance which rendered the errors still more dangerous.

Paley says the object of punishment is not retribution, but the prevention of crimes—to deter the offender in future, and others by his example. Severity is to be proportioned not to the guilt, but to the difficulty and the necessity of preventing crimes. If crime is preventable by other means, punishment is unnecessary. Penalties should be made severer in proportion to the facility with which any species of crime is perpetrated. The uncertainty of punishment should be compensated by its severity. Now there are two methods of administering penal justice: one is to assign

¹ *Principles of Moral and Political Philosophy* (1785), bk. vi, chap. ix.

² *Thoughts on Executive Justice* (1785). See *supra*, Life of Romilly, *sub ann.* 1785.

capital punishment to few offences and inflict it invariably; the other is to prescribe it for many kinds of offences, but to inflict it only on a few examples of each kind. The latter is the better, and is the one in use in England; scarcely one-tenth of the number of persons sentenced to death are executed, and these cases are determined by the judge according to circumstances of malignity, and other aggravations. The law of England "sweeps into the net every crime which, under any possible circumstances, may merit the punishment of death," but carries out the penalty only in a few cases. Thus, "few actually suffer death, whilst the dread and danger of it hang over the crimes of many." The laws are cruel only in appearance; for they "were never meant to be carried into indiscriminate execution." Moreover, the legislature relies on the intervention of the Crown. Yet he can say: "The certainty of punishment is of more consequence than the severity." "The frequency of capital executions in this country [as compared with other countries] owes its necessity to three causes—much liberty, great cities, and the want of a punishment short of death, possessing a sufficient degree of terror." He condemns transportation, because it does not serve as an example, and is not severe enough for many; he deprecates "barbarous spectacles of human agony," but is in favour of the pillory for all who are capable of feeling the humiliation. Finally, he objects to the maxim, "that it is better that ten guilty persons escape than that one innocent man should suffer"; and insists that courts should apply the rules of evidence and procedure, and not be deterred by "every suspicion of danger." "They ought rather to reflect, that he who falls by a mistaken sentence may be considered as falling for his country, whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained and upholden."

Madan (who sets forth certain principles antithetical to Paley's) laments that dangerous and atrocious crimes are more frequently committed in this country than in any other civilised state,¹ and believes that "a complete and adequate redress" is to be found in a vigorous application of the existing laws, of whose severity no one but the criminal can reasonably complain. Their rigour, he asserts, is "of the most wholesome kind." Severity produces fear, and so is the best prevention; making

¹ *Thoughts*, etc., p. 4. (The edition used is that of 1785.)

an example of the guilty deters others. But the desired effect has not been brought about, because judges and administrators of the law have for a long time been neglecting their duty. They have "been preferring their own *feelings* as *men*, to the duty which they owe the public as *magistrates*; and have been making so wanton and indiscriminate an use, or rather *abuse*, of certain discretionary powers with which they are invested, that safety and impunity invite forth and harden offenders, while danger and distress are everywhere menacing the innocent."¹ Crime flourishes, not because of any intrinsic defect in the law, but because "punishment has been rendered so *uncertain*, or rather the suspension of it so *certain*, as to prevent the operation of the laws."² Too often, he declares, do judges recommend offenders to mercy; "this is a *dispensing power* over the penal laws."³ He emphasises that the "*rabies parcendi*" is not mercy, but the highest cruelty.⁴ Neither transportation nor imprisonment on the hulks is a sufficient example. The penalty of death has the greatest terror. Preventive measures have been tried and found useless; the only means is to put the laws strictly and punctually into execution,⁵ and if this be done scarcely "any other human system could equal the present for the suppression of public injury."⁶ Juries frequently commit perjury by acquitting prisoners, "in the very face of the clearest and most indisputable evidence";⁷ thus they have more regard to their feelings than to their oaths. "If through *favour* they acquit, through *prejudice* they may convict."⁸ Therefore judges should warn them against trifling with their oaths. He deplotes the "too great and indiscriminate indulgence of those amiable, but ill-timed, exertions of lenity and compassion, which had so long been turned into incitements and occasions of evil in the minds of wicked and profligate men";⁹ and he concludes with the observation that reprieves and pardons have brought more men to the gallows than they ever saved from it.¹⁰ The essence of the writer's argument is, then, that the law, which is perfectly good and adequate, should be executed unrelentingly in every case, without allowing the least relaxation. And this in spite of the fact that there were nearly two hundred capital offences!

Such is the purport of a tract which, though dogmatic and showing the author's lack of knowledge, reasoning power, and

¹ *Ibid.*, p. 14. (The italics are in the original.) ² *Ibid.*, p. 34. ³ *Ibid.*, pp. 46, 51.

⁴ *Ibid.*, p. 69. ⁵ *Ibid.*, p. 79. ⁶ *Ibid.*, p. 133. ⁷ *Ibid.*, p. 135. ⁸ *Ibid.*, p. 139.

⁹ *Ibid.*, Appendix, p. 2. ¹⁰ *Ibid.*, Appendix, pp. 4, 5.

understanding of human nature, made a great impression on judges, and influenced their action. "It was very much read," says Romilly, "and certainly was followed by the sacrifice of many lives, by the useless sacrifice of them; for though some of the judges, and the Government, for a time, adopted his reasoning, it was but for a short time that they adopted it; and, indeed, a long perseverance in such a sanguinary system was impossible."¹ To Lord Ellenborough's denial that the book gained converts among judges and ministers, Romilly replied by submitting plain facts: "In the year 1783, the year before the work was published, there were executed in London only 51 malefactors; in 1785, the year after it was published, there were executed 97; and it was recently after the publication of this book that was exhibited a spectacle unseen in London for a long course of years before, the execution of nearly twenty criminals at a time."² In his *Observations on a late publication* (1786), he draws attention to the fact that for some twenty years the study of criminal jurisprudence has been making progress throughout Europe (he is, no doubt, thinking of the impetus given by Beccaria's treatise, published in 1764); "absurd and barbarous notions of justice, which prevailed for ages, have been exploded, and humane and rational principles have been adopted in their stead."³ Thus the *Thoughts on Executive Justice* advocates a view that is now being everywhere discarded, and "breathes a spirit contrary to the genius of the present times." "What the author's motives in writing were, God and himself only know."⁴ His doctrine is not supported by dispassionate argument; he uses, rather, far-fetched hyperboles, ferocious language, and exclamations, "all the most specious colourings of rhetoric" — "at one time artfully and eloquently summoning to his aid the fears of his timid readers, and at another kindling the rage and indignation of what he calls the 'poor, oppressed, and innocent public.'"⁵ He bases the whole of his appeal on the ground that the penal laws of the country are excellent; but this fundamental proposition is false, and so invalidates the entire argument.

For the sake of convenience, and to avoid overlapping and repetition, Romilly's views have been sought out from his various writings and his speeches, extending over a long period, and are presented in a re-arranged form in the following concise statement.

¹ *Memoirs*, vol. i, p. 89.

² *Ibid.*, p. 7.

³ *Ibid.*

⁴ *Observations*, etc., p. 2.

⁵ *Ibid.*, pp. 9-11.

(i) RIGOROUS CHARACTER OF THE EXISTING LAW AND ITS CONSEQUENCES

" . . . A very transient view will suffice to discover the absurdity and inhumanity of the system, if that name can with any propriety be given to a mass of jarring and inconsistent laws, which are severe where they should be mild, mild where they should be severe, and which have been, for the most part, the fruits of no regular design, but of sudden and angry fits of capricious legislators." ¹ The long dreadful catalogue of capital felonies contains "transgressions which scarcely deserve corporal punishment, while it omits enormities of the most atrocious kind." ² Many statutes, providing for obsolete offences, still remain as "bloody monuments of our history." Picking a pocket of the value of twelve pence farthing is a capital offence; to commit a murderous assault, to attempt the life of one's own father, certain cases of arson, are only misdemeanours. There are gross inconsistencies in the legal definition of crimes. "We find that under certain circumstances a man may steal without being a thief, that a pick-pocket may be a highway robber, a shop-lifter a burglar, and a man who has no intention to do injury to the person of anyone a murderer; that to snatch a watch out of a man's pocket in the street is a highway robbery; that to steal fruit ready gathered is a felony; but to gather it and steal it is only a trespass; that to force one's hand through a pane of glass at five o'clock in the afternoon in winter to take out anything that lies in the window, is a burglary, even if nothing be actually taken; though to break open a house with every circumstance of violence and outrage at four o'clock in the morning in summer, for the purpose of robbing, or even murdering the inhabitants, is only a misdemeanour; that to steal goods in a shop, if the thief be seen to take them, is only a transportable offence; but, if he be not seen, that is, if the evidence be less certain, it is a capital felony, and punishable with death; that, if a man firing at poultry with intent to steal them inadvertently kill a human being, he shall be adjudged a murderer and suffer death accordingly." ³

Such a sanguinary and barbarous penal code is not, and cannot be, carried into execution.⁴ For some time past, Romilly says, only about one-sixth of those sentenced to death have been

¹ *Ibid.*, p. 15.

² *Ibid.*, pp. 16, 17.

³ *Ibid.*, pp. 20-22.

⁴ *Speeches*, vol. i, p. 108.

executed; putting aside the most atrocious crimes, the number executed is about one-twentieth of those sentenced to death for other capital offences. He gives a table for the years 1802-1808 which shows a similar disproportion. For the last seven years, according to the returns of the Secretary of State, 1872 persons were tried for shoplifting and stealing in dwelling-houses, and only one was executed. He applauds the wisdom and humanity of the lenity.¹ He is not for the total abolition of the death penalty, but he is certainly in cases of offences against property. "A sum of money and the life of an individual are incommensurable." ■ At all events, the frequency and the indiscriminate application of capital punishments are to be strongly deprecated. Death sentences, moreover, are pronounced, which, very frequently, are not intended to be carried out; as such they amount more to a condemnation of the law than of the persons found guilty.³ Thus, extreme severity of the code leads to its non-execution; there may as well be no system of penal justice at all. "The question, therefore, is whether the execution of the law is to be the rule or the exception to be observed in the administration of justice; whether a code shall continue to exist in *theory*, which has been lately described (in language which one would rather have expected to hear from the lips of a satirist, than from a seat of judgment) 'as almost abrogated in *practice* by the astuteness of judges, the humanity of juries, and the mercy of the Crown.' I am far from being disposed either to censure or regret this relaxation of the law; I am only inquiring whether statutes so dispensed with can be deemed any longer essential to the well-being of the State. . . ." ⁴ It is obviously inexpedient to retain them, and flourish them, in vain, over the heads of malefactors. Where some punishment is clearly merited, none is inflicted, and the offender escapes altogether with impunity.⁵ He quotes a passage from Burke where he assails the policy of retaining non-executed penal laws as dangerous and absurd.⁶ Through the failure to carry out the law, not only does a delinquent go free, but the still greater commission of crime is encouraged, as persons with evil propensities are not inspired with terror.⁷ "Unless we can alter the nature of man, unless prosecutors shall arise more ferocious than any that have ever yet existed, and

¹ *Speeches*, vol. i, p. 113.

■ *Observations*, p. 24.

■ *Speeches*, vol. i, p. 460.

■ *Ibid.*, p. 39.

■ *Ibid.*, p. 427.

⁶ This passage has already been quoted in full, *supra*, essay on Bentham, chap. ii, *in fin.*

⁷ *Speeches*, vol. i, p. 429.

juries shall be constituted very differently from what they are at present," provisions of excessive rigour can never be carried out.¹ To render laws respected and efficacious, they must be strictly applied; but to facilitate their regular application, it is absolutely indispensable that those laws should be wise, just, and approved by the conscience of the people; otherwise, if attempts are made vigorously to enforce them, they will, inevitably, be all the more despised and detested.²

As conditions are, injured parties refuse to prosecute. The same result is seen in France, according to the testimony of Servan, advocate-general of Grenoble: "Cette loi si dure s'est corrigée par elle-même; l'horreur de voir un gibet à sa porte, et la crainte de la haine et des malédictions publiques, arrêtent la plainte des maîtres; et l'excès même du châtement a produit l'impunité d'un vol, qu'une loi plus modérée eût infailliblement réprimé."³ Similarly, witnesses decline to give evidence, or withhold material facts, or deliberately distort their testimony so as not to be instrumental in bringing a capital conviction upon the head of an accused; particularly so when they are impressed with the cruelty and injustice of the law that is alleged to have been violated. Juries, too, become implicated in crimes themselves; they wilfully commit perjury, by giving a verdict against the evidence, rather than override the dictates of humanity; for they cannot help recognising the gross disproportion of the penalty to the offence. Thus, "the law defeats its own ends and becomes the abettor of its own violation."⁴ Romilly deprecates Blackstone's description of such conduct of juries as a "pious perjury." He holds, on the contrary, that "nothing has a more immoral tendency than for men to familiarise themselves with the disregard of their judicial oaths";⁵ and doubts whether perjury of this kind, involving, as it does, the profanation of God's name, is inferior in moral guilt to, and is a less dangerous example than, the misdeed it was intended to screen.⁶ He gives one or two striking instances, among many that can be quoted, to illustrate the mischievous proceeding. "A woman of the name of Bridget Macallister was indicted [November 21, 1808] at the Old Bailey for stealing a £10 Bank of England note in a dwelling-house. The fact was clearly proved, and the jury convicted the prisoner, but found her guilty of stealing what was of the value

¹ *Speeches*, vol. ii, p. 180.

² *Observations*, p. 87.

³ *Discours sur l'administration de la justice criminelle* (Lyon, 1774), p. 96.

⁴ *Observations*, p. 42.

⁵ *Ibid.*

⁶ *Speeches*, vol. i, p. 241.

only of 39s. Thus twelve men executing a most sacred judicial office declared before God, and as they hoped for salvation, that a £10 Bank of England note was worth only 39s.!"¹ Again, "an apprentice to a lapidary who lived in St. Giles's was tried in 1807. The indictment was for stealing a pocket-book, estimated at 6d., and eight bank-notes value £10 each. The lad was undoubtedly guilty; but until this first offence, he had been a faithful servant, and partly by the master's inattention to his own property, the lad had yielded to the temptation. The jury found him guilty of stealing to the value of 39s."² Further, judges who vary, naturally, in their habits, sentiments, and modes of thinking, adopt different practices; and there are no rules to govern their action in advising as to the prerogative of mercy. This important matter is left to their own discretion, which not infrequently means humour and caprice.³ It is clear, then, from all these considerations, that the threat of inordinate severity, which, it is recognised, will probably prove abortive, can scarcely operate to affect the will of men, and prevent the commission of crime. "The prospect of evil which men know to be possible, but believe to be highly improbable, has seldom much influence in determining their conduct."⁴

Besides, does terror really operate so effectively on men's minds? "... It has in all times been adduced by power as a reason for giving a permanent efficacy to the impetuous enactments of ambition, avarice, or revenge. If authority, instead of considering its own will as the standard of right, would deign to look back and profit by the experience of past ages; if it would stay for a moment to reflect upon the miseries which have in vain been inflicted by man upon man; if it would inquire what good has resulted from burning, from impaling alive, from the rack, from the wheel, from tearing limb from limb, less reliance would be placed upon these supposed beneficial effects of terror. If terror could have prevented crime, crime would have long since ceased to exist, and sin may now soon be exterminated from the world. ... It is not merely by terror, but by exciting in the community a sentiment of horror against any particular act, that we can hope to deter offenders from committing it; and although threats may tend to increase the horror when it is in conformity with public sentiment, yet when it is in opposition

¹ *Speeches*, vol. i, p. 240.

² *Observations*, p. 42.

³ *Ibid.*, p. 347.

⁴ *Speeches*, vol. i, p. 189.

to such sentiment, it may have an opposite tendency. . . . If intimidation will prevent crime, why should not the terror of death attend the most trifling offences? Why stop at the terror of death for any offence?"¹

"When vice is tempted by the certainty of gain, and the certainty of immediate gain, it will have recourse to every expedient to indulge its depraved propensities: it will delude itself with the chance of concealment, with the hope of flight, with all the various deceptions which misguided passion is ever prone to discover when bent upon gratification. Frame your laws in such a spirit that they cannot be executed; let the parties injured acquiesce in their losses; let witnesses suppress the truth, juries evade their oaths, and your judges arrest the law in its course; and depend upon it, it will not be the severity of your *threats* that will be regarded. Amidst so many chances and hopes of escape, they will be almost overlooked, and vice will be attracted to perpetrate the crimes from which, by a more certain punishment, it would instantly be repelled."² It follows, then, that a diminution in the rigour of penalties, added to certainty of application, will obviate a good many of the above-mentioned evils and difficulties which are incidental to the old system. To the allegation of his opponents that the repeal of the death penalty for picking pockets to an amount exceeding a shilling was followed by an increase of this crime, Romilly replied that it was by no means the number of offences that increased, but the number of prosecutions; so that the success of the measure, even for this reason alone, was indubitable.

(ii) NECESSITY OF REFORM

It follows from the above considerations that a substantial revision of our criminal jurisprudence is indispensable. "The laws themselves proclaim their own absurdity, and call aloud for reformation."³ Drastic innovation is sooner or later inevitable; for the "wisdom of our ancestors" does not suffice for the present time. The long usage of a law does not necessarily prove its sanctity. "But the truth is that the system upon which we now act has no antiquity to recommend it, and that if we would really take those ancestors, who are thus praised, for our models, we must make the administration of justice such a scene

¹ *Ibid.*, pp. 462-465.

² *Ibid.*, p. 348.

³ *Observations*, p. 24.

of butchery, as the sternest of those who exclaim against innovation would themselves be appalled at it. The wisdom, if so it is to be called, of our forefathers led them not to make only, but strictly to execute, these sanguinary laws; not to appoint only, but actually to inflict, the punishment of death with undistinguishing barbarity."¹ Opponents of change appealed to the maxim, "Nolumus leges Angliae mutari"; but Romilly reminded them that those words were first used by the barons "when they resisted the attempt of the Crown to overturn the whole system of our laws, and to substitute the old Roman or civil law for the common law of the land."² We must depart from old ways, when it is just and useful to do so. We should bear in mind the aphorism that "a froward retention of custom is more baneful than innovation; and they who reverence too much old times are not of most service to the new."³ Every institution now in existence was at one time or other an innovation. Thus the sentence of embowelling, in the case of treason, is not part of the common law. Romilly asks the enemies of reform whether, had they lived some years ago, they would have been in favour of such "bulwarks of the constitution" as embowelling alive, the "peine forte et dure," the writ "de haeretico comburendo," or the burning of women alive for petty treason, and whether the removal of these "bulwarks" has endangered the constitution.⁴ Lord Ellenborough too, opposing a bill to abolish the punishment of the pillory, held up its antiquity as a merit, and declaimed against innovation.⁵ To the argument of opponents that certain judges were against relaxation in the rigour of penalties, Romilly replied (with no little satirical force) by setting against those authorities the contrary views of men of the highest eminence and the widest experience. "Great as is the authority of Mr. Recorder and Mr. Common Sergeant, I hope it will be remembered that they are opposed by such authorities as Dr. Johnson, Sir Thomas More, Sir William Blackstone, Lord Coke, and Lord Bacon."⁶

The earlier English code was barbarous in the extreme. Thus by a statute enacted in the reign of Queen Elizabeth⁷ (and executed till the time of Charles I), it was a capital offence for anyone above the age of fourteen to associate for a month with persons calling themselves "Egyptians"; and Hale, the Chief

¹ *Speeches*, vol. i, p. 192.

² *Ibid.*, pp. 457, 458.

³ *Ibid.*, p. 468.

⁴ *Ibid.*, p. 476.

⁵ *Memoirs*, vol. iii, p. 190.

⁶ *Speeches*, vol. i, pp. 355, 356.

⁷ 5 Eliz. c. 20. Repealed by 23 Geo. III, c. 51.

Justice and jurist, states that in his time no fewer than thirteen victims of this law were put to death on one single occasion. An act passed in the reign of James I¹ made it a capital offence to commune with the devil. Fortescue, the Chief Justice, afterwards Lord Chancellor under Henry VI, says that in his days more criminals were executed in England for robberies in one year than in France in seven. Holinshed states that in the reign of Henry VIII, about 72,000 persons died by the hand of the executioner, that is at the rate of 2000 a year. Under Elizabeth there was a certain relaxation, but it appears that some 400 a year were put to death.² Romilly asks, then, whether the legislature is to follow the counsel of these eulogists of the "wisdom of our ancestors," and re-introduce the sanguinary practices of an earlier age, or enforce the ferocious laws that still remain on our statute-book. He commends the prevailing mitigation, but demands that the existing system should be purged of all barbarous relics, that more rational provisions should be made, and the whole consolidated conformably to the advance of the people's manners, and to the more enlightened views spreading throughout the country. Then will Justice be restored to her rightful dominion, and the criminal law will no longer remain ineffectual through its specious terror and futile applicability. Supreme wisdom, deep knowledge, profound experience of men, and intimate sympathy are needed for the delicate work of penal legislation. But, as conditions are, "every novice in politics is permitted, without opposition, to try his talents for legislation, by dealing out death among his fellow-creatures; and laws of this kind commonly pass as of course, without observation or debate";³ whilst the most insignificant bill concerning money or property obtains repeated discussion.

(iii) OBJECT AND CHARACTER OF PUNISHMENT

[Romilly gives a threefold division of punishments, as they operate in the prevention of crime: first, punishment of the individual malefactor operating on society in the way of terror; secondly, putting it beyond the offender's power to commit crimes in future, either for a specified period or for ever; thirdly, applying special means for the purpose of reforming the criminal.⁴ Almost the whole of our law has overlooked the important end

¹ 1 Jac. I, c. 12. Repealed by 9 Geo. II, c. 5. ² *Speeches*, vol. i, pp. 110, 111.

³ *Observations*, p. 43.

⁴ *Speeches*, vol. i, p. 248.

of punishment, namely, the reformation of the criminal.¹ "The primary object of the legislature should be to prevent crimes, and not to chastise criminals; that object cannot be attained by the mere terror of punishment."² Though the imposition of penalties is intended as a deterrent, it does not follow that it is legitimate to deter men from offending by employing any means whatever. Thus the punishment chosen should be such as will not violate public feeling. Romilly refers to the case of Lord Cochrane who was convicted, with several others (1814), for conspiring to raise fraudulently the price of the public funds. The sentence on him was inordinately severe: a fine of £1000, a year's imprisonment, and the pillory. He was afterwards, however, re-elected by the City of Westminster, and the Government found itself obliged to remit part of the penalty imposed. "A stronger instance can hardly be found," comments Romilly, "of the mischief done by punishments which are repugnant to public feeling and opinion."³

The penalty should always be carefully proportioned to the offence. In accordance with the doctrines of Bentham, Romilly observes: "All punishment is an evil, but is yet necessary to prevent crimes, which are a greater evil. Whenever the legislature therefore appoints for any crime a punishment more severe than is requisite to prevent the commission of it, it is the author of unnecessary evil. If it do this knowingly, it is chargeable with wanton cruelty and injustice; if from ignorance and the want of a proper attention to the subject, it is guilty of a very criminal neglect."⁴ To impose the same punishment on a man who picks a pocket as on a man who murders his own father is to confound all ideas of justice, and to render the laws objects of horror and aversion.⁵ Sometimes offences are closely connected; and if one of them is to be committed at all, it is obviously less dangerous to the community that the less heinous one be committed. But, says Romilly, "I am at a loss to comprehend how, by inflicting the same punishment for crimes of different malignity, criminals are to be deterred from committing the more atrocious offences."⁶ If death is prescribed for smaller crimes, what punishment is to be inflicted for the grosser crimes? Romilly reminds his auditors in the House of Commons of the kind of reasoning indulged in by our ancestors. "The law which punishes with death the offence

¹ *Observations*, p. 59.

² *Ibid.*, p. 4.

³ Letter to Dumont, Aug. 17, 1814; *Memoirs*, vol. iii, p. 150.

⁴ *Observations*, p. 27.

⁵ *Ibid.*, p. 4.

⁶ *Speeches*, vol. i, p. 350.

of privately stealing in a shop property to the value of 5s. was enacted in the year 1699. Two years after it had passed (1701) an anonymous writer published a tract, which has been recently reprinted, to prove that hanging was not a sufficiently severe punishment for murder, burglary, or highway robbery. 'If death,' he says, 'be due to a man who surreptitiously steals the value of 5s., as it is made by a late statute, surely he who puts me in fear of my life and breaks the king's peace, and, it may be, murders me at last, and burns my house, deserves another sort of censure; and if the one must die, the other should be made to feel himself die'; and the author accordingly proposes breaking upon the wheel and whipping to death as punishments proper to be adopted."¹ Asked by an opponent whether no distinction is to be made between, say, the punishment of treason and that of common felonies, he replies that there ought, of course, to be a distinction between crimes so widely different; "but this distinction ought to be made, not by the introduction of torture, not by augmenting the pains for these extreme offences, but by lowering the penalties, by abolishing the punishment of death for pilfering a few shillings."² The severity of the penalty should not be determined by the legislator's vindictive feeling, or by his hatred of this or that class of delinquents. "The worst criminal is still a man, and as such is entitled to justice."³

If punishment is to operate as a preventive of crime, it should be exemplary. "In the present system, however, the benefit of example is entirely lost; for the real cause of the convict's execution is not declared in his sentence, nor is it in any other mode published to the world. . . . Nothing more is learned from the execution of the sentence, than that a man has lost his life because he has done that which by a law not generally executed is made capital, and because some unknown circumstance or other existed either in the crime itself, or in the past life of the criminal, which, in the opinion of the judge who tried him, rendered him a fit subject to be singled out for punishment."⁴

One of the most essential attributes of punishment is the certainty of its application. [A mild punishment that is certain has a more deterring effect than the threat of a severe punishment that may not be carried out.] Hence certainty, without due proportion, is either impossible or productive of the most

¹ *Ibid.*, p. 181.

² *Observations*, p. 51.

³ *Ibid.*, p. 476.

⁴ *Speeches*, vol. i, pp. 132-134.

barbarous ferocity.¹ 'Certainty of punishment is much more efficacious than any severity of example for the prevention of crimes. So evident is the truth of that maxim, that if it were possible that punishment, as the consequence of guilt, could be reduced to an absolute certainty, a very slight penalty would be sufficient to prevent almost every species of crime, except those which arise from sudden gusts of ungovernable passion. If the restoration of the property stolen, and only a few weeks' or even but a few days' imprisonment, were the unavoidable consequence of theft, no theft would ever be committed. No man would steal what he was sure he could not keep; no man would, by a voluntary act, deprive himself of his liberty, though but for a few days. No man would expose himself to certain disgrace and infamy, without the possibility of gain. It is the desire of a supposed good, which is the incentive to every crime; no crime, therefore, could exist, if it were infallibly certain that not good, but evil, must follow, as an unavoidable consequence to the person who committed it. This absolute certainty, it is true, can never be attained where facts are to be ascertained by human testimony, and questions are to be decided by human judgments. But the impossibility of arriving at complete certainty ought not to deter us from endeavouring to approach it as nearly as human imperfection will admit; and the only means of accomplishing this, are a vigilant and enlightened police, rational rules of evidence, clear and unambiguous laws, and punishments proportioned to the offender's guilt."²

It follows from the above considerations that another condition to be fulfilled is that the law—especially statutes—should be made known to all, and the offences clearly defined so as to admit of neither injustice nor subterfuge. But where the positive law differs from the law that is actually executed, it is the latter that should be promulgated, since this alone can operate to prevent the commission of crime.

Generally, there should be no deviation from the law as announced. When once its reasonableness, adequacy, proportion are assured, certainty of application is all-important. Consequently, it is wrong to invest judges and magistrates with an unlimited discretion. Those in favour of the existing practice hold that "the only way in which it can be provided that the guilt of the punishment shall in all cases be commensurate, is

¹ *Observations*, pp. 63-70.

² *Speeches*, vol. i, pp. 127, 128.

to announce death as the appointed punishment, and to leave a wide discretion in the judge of relaxing that severity, and substituting a milder sentence in its place.”¹ Romilly is not against allowing the judges a large discretion as to the degree of punishment to be inflicted for each offence; “but there is a wide difference between intrusting the judges with the power to determine the degree in which the same species of punishment may be inflicted, and leaving it dependent on their will whether the offender shall be put to death, or shall only suffer a six months’ imprisonment.”² Blackstone observes that it is one of the glories of our English law that the species, though not the degree, of punishment is laid down beforehand. But this is not so; for in practice the judge may, in the case of a great number of felonies, decide himself whether the criminal shall suffer death, transportation, or imprisonment. Besides, in the case of libel and other misdemeanours the law itself empowers judges to determine whether a penalty involving infamy, or one to which no dishonour whatever is attached, shall be inflicted.³

To give a discretionary power to judges is one thing, but it is quite a different thing to appoint a punishment by law and allow the judge to remit it. The extending of clemency will often be made to depend, not on the intrinsic nature of the crime, and on the circumstances of its commission, but on secondary accidental circumstances, on more or less irrelevant considerations. The jury, and not the judge, ought to decide as to questions of aggravation. But if a wide discretion is to be entrusted to magistrates, “the legislature ought at least to lay down some general rules to direct or assist them in the exercise of it, that there might be, if not a perfect uniformity in the administration of justice, yet the same spirit always prevailing, and the same maxims always kept in view. If this be not done, if every judge be left to follow the light of his own understanding, and to act upon the principles and the system which he has derived partly from his own observation and his reading, and partly from his natural temper and his early impressions, the law, invariable only in theory, must in practice be continually shifting with the temper, and habits, and opinions of those by whom it is administered. . . . The same benevolence and humanity, understood in a more confined or a more enlarged sense, will determine one judge to pardon and another to punish. It has often happened

¹ *Ibid.*, p. 116.

² *Ibid.*

³ *Ibid.*, note.

. . . that the very same circumstance which is considered by one judge as matter of extenuation, is deemed by another a high aggravation of the crime," for example, the novelty of the crime, its frequency, the facility with which it could be committed, the offender's youth, the fact that it was his first offence, the intoxication of the prisoner, etc. Different judges take a different view not only of the accompanying circumstances, but also of the crime itself, and the same judge, in the same circumstances, acts differently at different times. "How do these fluctuations of opinion and variations in practice operate upon that portion of mankind, who are rendered obedient to the law only by the terror of punishment?"¹

In accordance with the penological principles set forth above, Romilly offers a criticism of the views of Paley,² who supported the prevailing system, and, above all, was in favour of the discretionary power vested in judges. It will be of interest to give in some detail Romilly's comments, which, it is to be remembered, were made in a speech³ (February 9, 1810) in the House of Commons, where Paley's authority was repeatedly cited as against the attempted innovations of Romilly.

PALEY.⁴ Of the two methods of administering penal justice—assigning the death penalty to few offences and invariably inflicting it, or assigning it to many kinds of offences, but inflicting it only on a few examples of each kind—the latter is preferable, and is the one adopted in this country, where very few of those sentenced to death are executed.

ROMILLY. It is inaccurate to represent these as the only methods; thus we would be reduced to the terrible alternative of choosing between the invariable and inflexible rule of inflicting death in all cases where the law has fixed it as a punishment, or investing the magistrates with that wide discretion which they have in this country. It follows from Paley's point of view that discretion is not only indispensable, but is to be arbitrarily exercised. Now the law, and not its administrator, ought to select objects of punishment; if there is to be any choice by the administrator, it ought to be a choice of the few to whom mercy is to be shown, and not of the few on whom punishment is to fall.⁵

¹ *Speeches*, vol. i, pp. 121, 122.

² *Principles of Moral and Political Philosophy*, bk. vi, chap. ix.

³ *Speeches*, vol. i, pp. 106 seq.

⁴ What is given here is not necessarily verbatim from either Paley or Romilly.

⁵ *Speeches*, vol. i, p. 143.

PALEY. It is incumbent on the legislature to fix the limit to which the punishment may be extended.

ROMILLY. The boundary on the side of severity is fixed by nature, not by law.¹

PALEY. The exercise of lenity may without danger be entrusted to the executive magistrate.

ROMILLY. Without danger, perhaps, of being too often exercised, but with very great danger that it may not be exercised often enough.²

PALEY. The magistrate's discretion will be exercised in accordance with those numerous unforeseen, mutable, or indefinable circumstances, both of the crime and the criminal, which constitute or qualify the malignity of each offence.

ROMILLY. The circumstances upon which the life of a human being is to depend, are then, it seems, of such a nature, that they cannot be foreseen, fixed, or defined. Not for any offence described in any written or traditionary law, but for an unforeseeable indefinable crime, it is that the punishment of death is to be inflicted; and the same writer who justifies this has himself declared a few pages earlier that the object of punishment is to prevent crimes, and that its severity should be regulated conformably to that object.³

PALEY. He (Paley) speaks of "deserving" the punishment of death, and makes an alternative of necessity and meriting.

ROMILLY. It would seem, then, that punishment of death is sometimes deserved when it is not necessary, and is sometimes necessary when not deserved. It is upon the ground of necessity alone that the death penalty can ever be justified. The difficulty of the alternative—if it be allowed—is increased, where the exercise of lenity is to depend on human, that is fallible, judgments, and even then on the varying practices and views of judges.⁴

PALEY. If death were specifically assigned to only one or two species of crimes, it would be known beforehand that crimes other than these might be committed with impunity.

ROMILLY. If this be an evil, it is an evil that the law should be known, or that there should be any law at all. It is extraordinary that in a country in which men have been accustomed to think that one of the greatest political blessings they enjoyed was, that they lived in the security which known and certain

¹ *Ibid.*

² *Ibid.*, p. 144.

³ *Ibid.*, p. 145.

⁴ *Ibid.*, p. 147.

laws afforded them, we should be told that it is good that laws be not known, because, if known, they might be evaded.¹

PALEY. He (Paley) speaks of "enormous crimes," and "heinous aggravations."

ROMILLY. These are vague and indefinite expressions; for there are many acts of the greatest moral depravity, for which neither death nor any other punishment of great severity is provided.²

PALEY. He assumes that there is no other course than to exclude the power of pardon altogether or to preserve the existing code of laws, and that cases of pardon must necessarily be much more frequent than those in which the law is executed.

ROMILLY. This assumption exists only in Paley's imagination, and yet his whole defence of the prevailing system is based on it.³

PALEY. The law of England is constructed on the policy of assigning capital punishment to many kinds of offences, but inflicting it only on a few examples of each kind.

ROMILLY. Not the *law* of England, but the *practice*, which is in truth an almost continual suspension and interruption of the law.⁴

PALEY. The three principal circumstances of aggravation that should guide the magistrate are repetition, cruelty, and combination.

ROMILLY. But these aggravations are as capable of being clearly and accurately described, in written laws, and are as proper to be submitted to the decision of a jury, as the crimes themselves.⁵ Moreover, when they are thus determined beforehand, such specific determination will operate more forcibly on the minds of ringleaders, principals, etc., than do the capricious conclusions of judges.

PALEY. By this expedient few actually suffer death, whilst the dread and danger of it hang over the crimes of many.

ROMILLY. The *chance* of it, he should rather have said, hangs over the crimes of many. In order that the dread of punishment may prevent crimes, punishment must, as nearly as can be effected, be the certain consequence of committing them.⁶

PALEY. The charge of cruelty is answered by observing that these laws were never meant to be carried into indiscriminate execution, that the legislature, when it establishes its last and highest sanctions, trusts to the benignity of the Crown to relax their severity as often as circumstances appear to palliate the

¹ *Speeches*, vol. i, p. 149.

² *Ibid.*

³ *Ibid.*, p. 151.

⁴ *Ibid.*, p. 157.

⁵ *Ibid.*, p. 154.

⁶ *Ibid.*, p. 159.

offence, or even as often as those circumstances of aggravation are wanting.

ROMILLY. To subject by law ten men to the punishment of death because one of them has, in the opinion of the legislature, deserved it, or, to speak more properly, has done that which makes it necessary to the public safety that his life should be sacrificed, and then "trust to the benignity" of the magistrate to discover the nine against whom it was "never meant that the law should be carried into execution"; to have no better security for the proper execution of this most important office than the benignity of the magistrate, and to afford him no light to guide him in the exercise of that benignity, is after all very cruel conduct in those who are the makers of the law.¹

PALEY. Takes for granted that in each class of capital crimes some instances are to be found which require the restraint of the death penalty.

ROMILLY. The validity of the assumption has by no means been established.

PALEY. He who falls by a mistaken sentence may be considered as falling for his country, whilst he suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained.

ROMILLY. Nothing is more easy than thus to philosophise and act the patriot for others, and to arm ourselves with topics of consolation, and reasons for enduring with fortitude the evils to which not ourselves but others are exposed. It is very doubtful whether this is attended with any salutary effects.²

PALEY. Believing so strongly in a discretionary power in the punishment of offences, he even justifies imprisonment for debt, and holds that English law properly constitutes the creditor both judge and party, seeing that no discretion is likely to be so well informed, vigilant, or active as that of the creditor himself.

ROMILLY. For these very reasons imprisonment for debt is to be condemned. Thus Burke denounces the practice on the ground that a civil judgment is converted into a criminal, and that the punishment depends on the arbitrary discretion not only of a private, but an interested and irritated, individual. Every idea of judicial order is subverted by allowing a private person to be at once judge and party.³

¹ *Ibid.*, p. 161.

² *Ibid.*, p. 166.

³ Cf. *Speech at Bristol previous to the Election* (1780).

(iv) SOME CRIMES AND PENALTIES CONSIDERED

In the course of his criminal law reform work, Romilly considered a large number of crimes, and constantly tested the suitability of the penalties prescribed for them by means of his fundamental principles of punishment.

We have just seen that, in the case of imprisonment for debt the views of Burke were also his own views. In an earlier speech, on the occasion of a bill to alter the bankruptcy laws (March 3, 1809), Romilly emphasised that imprisonment for debt ought to be abolished altogether. "It is mischievous to the individual; it is pernicious to the public; and though the imprisonment may, in many cases, be just, yet it is certain that in many others it is equally unjust. But with respect to an uncertified bankrupt, it is always unjust; for the only object of the punishment is to compel him to do that which the law supposes impossible—which it has indeed rendered it impossible for him to perform, without hazarding the penalties of a capital felony. The punishment, therefore, in this case must be unjust. But consider only the circumstances under which it is inflicted, the relative situation of the parties concerned, and the consequences which must frequently result from such a state of things. Think of an individual invested with judicial power in his own cause, and over one who may, who must have offended him by defeating, however innocently or reluctantly, his legal claims. What must be the condition of the unfortunate bankrupt so situated, exposed without defence to the discretion of his irritated creditor and judge, destitute alike of all remedy or hopes of relief, except for the mercy of an enraged enemy? How frequently has this power been rendered subservient to the gratification of the basest and most malignant passions! How frequently has the revenge of an envious competitor been satiated by the imprisonment of his victim for life! Paradoxical as it may appear, it is not less true that certificates are more frequently withheld from the candid and honest than from the fraudulent bankrupt. They are often withheld by some one or two rapacious creditors for the purpose of extorting money from the friends, perhaps from a son, a brother, or a father of the bankrupt, and of thus securing to themselves an undue advantage over the other claimants. What a temptation to fraud does this hold out to the bankrupt—a temptation which, though far from justifying his weakness or want of moral

principle, nevertheless ought not to be thrown in his way! . . . Render the law more efficacious by making it less severe. The frequency of fraudulent bankruptcies may be traced to the unrelenting rigour of the penalty which the law has attached to the offence.”¹ Elsewhere he asks: If punishment for insolvency is to be maintained, on what principle is it to be proportioned? If it is to be based on inability to pay, as many advocated, and not on the degree of criminal conduct, then the severity of the debtor’s punishment will increase according to the extent of his misfortunes.² The excessive rigour of the law (he says in 1817), which prescribes capital punishment in the case of a bankrupt not appearing to his commission or withholding property from his creditors to the amount of £20, entirely defeats the very object of the law. Scarcely any convictions occur under the existing provisions, despite the frequency of offences. Men choose to submit patiently to the frauds practised on them rather “than to become parties to the execution of such cruel and sanguinary laws.”³

Soon afterwards the validity of Romilly’s views was recognised. In a report on the bankruptcy laws presented by a committee of the House of Commons (May 1818), it was stated that “the law by which capital punishment is ordered to be inflicted upon fraudulent bankrupts, and upon those who do not surrender, is so severe and so repugnant to the common sentiments of mankind, that it becomes totally inefficient in its operation; and hence the most flagitious individuals escape with impunity.”

Though Romilly tried hard for many years to bring about the repeal of numerous statutes making a great number of offences capital felonies, he was not in favour of abolishing the death penalty. In one of his very earliest pronouncements on penal institutions, he observes:⁴ “I am much obliged to you for giving me your sentiments on the question whether any crime ought to be punished with death. The objection you make to the punishment of death, founded on the errors of human tribunals and the impossibility of having absolute demonstration of the guilt of a criminal, strikes me more forcibly than any argument I have ever before heard on the same side of the question. I confess, however, that to myself it seems absolutely impossible,

¹ *Speeches*, vol. i, p. 71.

² *Memoirs*, vol. iii, p. 167.

³ *Ibid.* pp. 295, 296.

⁴ Letter to his brother-in-law, Rev. John Roget, May 1783 (written just before Romilly was called to the bar); *Memoirs*, vol. i, pp. 277–279.

even if it were to be wished (of which I am not quite sure), to omit death in the catalogue of human punishments; for if the criminal will not submit to the punishment inflicted on him, if he escapes from his prison, refuses to perform the labour prescribed to him or commits new crimes, he must, at last, be punished with death. So it is, at least, in the *Utopia* of Sir Thomas More; and it is a very melancholy reflection that some of the miserable victims of that excellent philosopher's compassion might, if his visions had ever been realised, have suffered years of miserable servitude in addition to the punishment of death, which would at last be inflicted on them as the consequences of crimes which they had been provoked to commit. One reason why I cannot think that death ought so carefully to be avoided among human punishments is, that I do not think death the greatest of evils. Beccaria and his disciples confess that it is not, and recommend other punishments as being more severe and effectual, forgetting, undoubtedly, that if human tribunals have a right to inflict a severer punishment than death, they must have a right to inflict death itself."

In the case of high treason, Romilly urged the abrogation of the part of the punishment that involves embowelling and quartering. In this matter the judges had no discretion, which was transferred to the executioner. "But though such inflictions have ceased to disgrace the country, ought the possibility of their recurrence to be allowed? Ought such a punishment to remain at this day upon the statute-book, to revolt the feelings of mankind, and to furnish foreigners with a reproach against our national character? Ought the terrors of a vain threat to be displayed in the hour of the wretched offender's fate, to bereave him of his understanding? Lord Bacon has recorded that in the time of Elizabeth these cruelties were generally excused by the example of other countries. But supposing such examples still to exist, are we prepared to admit them as justifications of our conduct in the present day?"¹ Romilly's opponents were in favour of preserving the part of the sentence which ordains that, after the offender is put to death, his head shall be cut off and his body divided into four quarters. They justified the severing of the head from the body "on the ground that it was the only constitutional mode of enabling the Crown to order that attainted traitors should be beheaded. They said that by law the Crown

¹ *Speeches*, vol. i, p. 431.

could not change any sentence for another; it could only remit a part of the sentence; and in these cases it, on some occasions, remitted all but the beheading. In truth, however, this notion of pardoning or remitting a part of the punishment, though it is sanctioned by the great names of Lord Coke, Lord Hale, and Lord Bacon, seems to be a very puerile conceit; since the taking away the first part of the punishment alters entirely the nature of what remains. It might as well be contended that the Crown might merely remit the hanging, and by that means cause the punishment to become that of tearing out the heart and bowels of the convict while he was in full life and possessed of all his unbenumbed susceptibility of pain; or that, if a sentence were that the criminal should be hanged, and then buried in a particular place, or hanged in chains or burned, the Crown might remit the hanging, and send the offender to be suspended in chains, or buried, or even burned while he was alive." ¹ Romilly contended against this doctrine, and argued "that the Crown had been considered to have a right by its prerogative to substitute a mild in the place of a severe punishment; that on this principle alone could be justified the many instances which had occurred of women convicted of treason being beheaded, though the judgment against them was merely that they should be burned, without any mention of severing the head from the body. Such were the cases of Anne Boleyn, Queen Catherine Howard, Lady Salisbury, Lady Jane Grey, and Mrs. Lisle. In the case of Mrs. Lisle, the matter had undergone much consideration, and James II had it clearly ascertained that he had a right to change the sentence before he did it. In the case of the Duke of Somerset, in the reign of Edward VI, and that of Lord Dudley, in the time of Charles I, though the offenders were convicted of felony, and merely sentenced to be hanged, the king changed their sentences into that of beheading." ²

As to corruption of blood, he pointed out that it was an oppressive relic of feudal tenure, and not really a penal law. Together with its associated consequences of prevailing escheat and future incapacities, it ought to be abolished. He showed that it operated to inflict punishment on the innocent for the crimes of the guilty; and this, possibly, after the lapse of a century, when the offender and his crimes are alike forgotten. "By corruption of blood a man is incapacitated not only from

¹ *Memoirs*, vol. iii, pp. 100, 101.

² *Ibid.*, p. 101.

inheriting and transmitting property, but even from forming a link in the chain of descent. No title of lands can be derived through him, however remote the ancestor from whom they may have descended, collateral relations in the first or twentieth, in the nearest and most distant degree of kindred, are alike subject to the effects of this law.”¹ Corruption of blood, he insists, is not a proper penalty at all for any crime whatever. It possesses none of the necessary characteristics of punishment. Punishment should fall on the guilty alone, but this falls on the innocent. Punishment should follow soon after the commission of the crime, in order that the requisite association of offence and penalty may be firmly impressed on men’s minds; but corruption of blood often takes effect long—sometimes many generations—after the crime has been committed. “Whether punishment should be inflicted or not ought never to depend upon the pleasure of private individuals; but corruption of blood, to interrupt the transmission of an estate, can only take effect when the ancestor is negligent enough to die without a will; for he is allowed to devise the estate to the very persons who are not permitted to inherit from him; so that it depends upon accident or neglect whether this shall or shall not be a punishment.” It is absurd to suppose that the prospect of a distant evil to remote relations—which may easily be avoided—can exercise a deterring influence on would-be malefactors. Again, by the constitution of the country, the Crown has the power to remit all punishments; but corruption of blood cannot be thus prevented, as it is regarded merely as escheat, and it frequently bestows rights not on the sovereign but on private persons.² Further, it does not apply to every part of the kingdom; for example, it does not operate in Kent, owing to the custom of gavelkind. It was introduced, along with other oppressive refinements of the feudal system, by the Normans; it is not found among the old laws of the country. “But the antiquity of the law is really not worth inquiring into; the more ancient any criminal law, the less likely is it to be founded on just and rational principles.”³

Romilly severely reprobated the abuses of corporal punishment. In any case, he held, flogging is a most disgraceful and degrading mode of punishment; whatever deterring influence it may exercise, it produces incalculable evil in that it debases

¹ *Speeches*, vol. i, pp. 434, 435.

² *Ibid.*, vol. ii, pp. 2, 3; *Memoirs*, vol. iii, pp. 96, 97.

³ *Speeches*, vol. ii, pp. 3, 4.

permanently the mind of the man upon whom it is inflicted. But, above all, the excesses, which are by no means infrequent, merit decisive condemnation.¹ Whatever reasons may be adduced for the continuance of such chastisement, there surely can be none for its brutal severity. In the course of his great speech in the House of Commons (February 9, 1810), he said: "We frequently read sentences of courts-martial ordering 500, 600, 800, nay, sometimes 1,000 lashes to be inflicted. We know, however, that this is a mass of suffering which God has not given any human creature sufficient strength at any one period to endure. To execute the sentence, therefore, it becomes necessary that the punishment should be portioned out into different lots, and dealt out at distant periods by certain limited instalments. As much bodily pain as will just bring the sufferer to the brink of the grave, and will there stop, is to be inflicted at one time; and to ensure its stopping there, a medical officer is to be present at the execution to feel his pulse, and to say from time to time how much vital capacity of suffering still remains. The surgeon may be unskilful, he may (for there is no humanity which can very long resist the effect of being frequently the spectator of such scenes) be neglectful of his duty, and in either case the punishment will become that of death in the most exquisite torments. It is extremely to be desired that all punishment should be exactly analysed, and that it should be clearly ascertained what is the nature and quantity of the suffering contained in each, that legislators and judges may with certainty know what will be the effect of the sentences which they ordain or pronounce. In making such an analysis of these military sentences it would be necessary to take into the account not merely the sharp and protracted agonies which are felt while the punishment is undergone, but the mental anguish which must be endured during the intervals which separate these executions; while the wretched offender lies in the hospital extended on his mattress, reflecting on the past, and looking forward with horror to the future, as he feels his wounds heal only that they may be torn open again by the lash, and his strength renewed only that it may be again exhausted by torments which are to reduce him to the very verge of existence."² He mentions the case of a soldier who, because he had come dirty on the parade, was so severely flogged that he died a few days after. Another man,

¹ *Ibid.*, vol. i, p. 381.

² *Ibid.*, pp. 179, 180.

who had been thirty years in the Guards, and whose conduct was irreproachable, was removed to the veteran battalions in the Tower; and later, because he had been absent a day, was, at the age of sixty, subjected to 300 lashes.¹ Again, he draws attention to the instance of two deserters belonging to the Cape Regiment. One of them, considered the worse offender, was shot; the other was sentenced to receive 1,000 lashes. The latter after receiving 224 lashes was, by the surgeon's direction, removed to the hospital, where he died some weeks later!² "We have here, for the more aggravated crime, a criminal simply deprived of life; and for the slighter offence another put to death with exquisite tortures; and by his sentence doomed to suffer four times as much misery as God had given him a capacity of enduring. Who can doubt that in this instance, and in many more which have occurred, a sentence of death would have been a sentence of mercy?"³ Romilly's endeavours to obtain a limitation of this form of punishment proved fruitless.

(v) ADMINISTRATION OF JUSTICE, PROCEDURE, JURISDICTION

Questions relating to the administration of justice, procedure, and jurisdiction engaged the attention of Romilly quite as much as those concerning substantive law. He maintained that it was inexpedient to prosecute a man and inflict a heavy punishment on him for an offence alleged to have been committed by him long before the prosecution. Thus he moved in the House of Commons for a copy of the report, sent by the Recorder of London to the Regent, of the case of one who was sentenced to seven years' transportation for bigamy, which had been committed thirteen years before the prosecution in apparently extenuating circumstances.⁴

Where the evidence is doubtful in the case of a crime, and especially in the case of one that is supposed to have been committed long before the charge is made, it is incumbent on prosecutor and judge to proceed with the utmost caution, and to insist on positive and invincible proof. Conformably to this

¹ *Memoirs*, vol. ii, p. 368.

² July 14, 1810. *Transactions of the Missionary Society*, vol. iii, p. 392. (Cited by Romilly.)

³ *Memoirs*, vol. iii, pp. 18, 19.

⁴ *Ibid.*, p. 166.

elementary principle, Romilly deprecates the execution of a man who was charged with having committed mutiny on board a certain vessel ten years before. The prisoner was twenty-five when he was tried, and so was fifteen at the time of the alleged offence. Obviously his appearance must have changed to a considerable extent during that interval; and yet on the unsupported testimony of identification given by a single witness, who admitted he had not seen the accused during the ten years that had elapsed, sentence of death was passed and carried into effect. Afterwards the dead man's innocence was clearly established; for it was shown conclusively that he had been elsewhere at the time of the mutiny.¹

Romilly strongly advocated that accused persons should be eligible to give evidence on their own behalf, and that judges should put questions to them not for the purpose of incriminating them, but in order to ascertain the real facts. He observes that many people appear to have "very superstitious notions of the rights and privileges of the persons accused of crimes"; and points out that the examination of prisoners is an indispensable part of every trial, if the object be "to discover the truth, to punish the guilty, and to afford security to the innocent." But in no case should judges cross-examine in such a manner as would make them practically parties or advocates for the prosecution.²

In reference to the proceedings of grand juries in Ireland, whose common law was the same as that of England, Romilly combated the doctrine advanced by some that "grand juries were not bound to require any other evidence to warrant their finding bills of indictment than the mere written and unauthenticated examinations returned by the magistrates." He insisted that grand juries were themselves bound to examine the witnesses upon whose evidence the charge was preferred. Failing this, the security of the life and liberty of subjects is considerably impaired.³ Further, he emphasised that questions of fact and circumstances of aggravation should always be left to the decision of the jury, and not determined by the judge.

Romilly was in favour of empowering justices of the peace to inflict a limited term of imprisonment for all minor offences investigated by them. In such cases, a summary conviction, where the punishment quickly follows the crime, is preferable

¹ *Ibid.*, vol. ii, pp. 188-190.

² *Ibid.*, pp. 83, 84.

³ *Ibid.*, vol. iii, pp. 218, 219.

to the slower, more cumbrous and expensive proceeding of an indictment and a trial before a jury. "Those who are always extolling the trial by jury forget how dearly it is often purchased. Those who are shocked at the idea of giving a justice of the peace power to imprison by way of punishment forget that in indictable misdemeanours, and in the case of poor persons who cannot find bail, justices have power to commit the accused till trial; that is, in most cases, for a longer period than the law would allow them to do as a punishment. For small offences, and in the case of persons in the lowest situation in life, a prosecution by indictment is, of itself, a grievous punishment. The power which the prosecutor alone has to remove the indictment by *certiorari* into the King's Bench, and that at any time, even just before the trial is expected; the fees which the defendant must pay before he can be permitted to plead that he is not guilty; and the acquittal fees which he must pay if he proves the truth of that plea, and the other expenses of a defence, are intolerable evils." ¹ But wide or extraordinary powers should not be conferred on magistrates. Accordingly, Romilly strongly opposed a bill that was to enable Irish magistrates, without a jury and without any bill of indictment, "to transport as felons persons who, in counties proclaimed as disturbed, shall not be found in their houses after a certain hour, and shall not be able to prove that they were absent on some lawful occasion." ²

In order to facilitate criminal proceedings, the expenses of prosecutors and witnesses should be reimbursed, and some compensation given them for their trouble and loss of time. Similarly, courts should have the power to make some pecuniary reparation to accused persons whose innocence has been clearly established.

Romilly deprecated a legal system that permitted the existence of conflicting or overlapping jurisdictions; such conditions might lead to confusion or to the arbitrary exercise of power. Accordingly, he urged that the penal powers of the Houses of Parliament, and their cognisance of offences committed against themselves, should be explicitly restricted and clearly defined, so that the jurisdiction of the ordinary tribunals of the country might not be interfered with.

¹ *Memoirs*, vol. ii, pp. 295, 296.

² *Ibid.*, vol. iii, p. 144.

(vi) CONDITION OF PRISONS AND PRISONERS

Romilly advocated the regular preparation of judicial statistics, giving the number of criminals tried, acquitted, and convicted, their crimes and sentences, a list of prisons, the number and condition of prisoners confined in each of them.

He drew attention to the serious evils inherent in the prevailing system of transportation.¹ He pointed out that this form of punishment was unknown before the restoration of Charles II; for the first statute on the subject was 18 Car. II, c. 3. Exile had, indeed, existed from the time of Elizabeth,² but both forms were unknown to the common law. Later statutes allowed judges, in their discretion, to transport persons convicted of offences within the benefit of clergy to the North American settlements.³ There they were bound by indentures for a period of seven years, and for the last three years they received wages, which provided a fund to enable them, on their return, to recommence life. There was one great evil arising out of inequality of treatment: whilst the richer convicts were able to buy off their terms of service and so convert their punishment into one of mere exile, the poorer convicts suffered hard labour as well as exile. Thus the cleverer rogues, who managed to retain what they wrongfully acquired, were placed in a better position than those who had surrendered their plunder.

After the American War the practice of confining convicts in the hulks was introduced.⁴ Romilly condemned this mode of punishment. There was no responsible person to determine what prisoners should be subjected to it. Offenders of all classes and ages were thrown together; and instead of being reformed there, they became much more depraved, and therefore when discharged were more dangerous to society than they were before. Even children and youths were sent to these floating prisons, where, obviously, they could learn nothing but every kind of vice and villainy. An act was also passed providing for transportation to any other part beyond the seas.⁵

The acts relating to the erection of penitentiary houses⁶ were for a long time allowed to remain a dead letter on the statute-book. In the meantime the Government conceived the plan of

¹ See *supra*, on Bentham, chap. ii, sect. ii.

² 39 Eliz. c. 4.

³ 4 Geo. I, c. 11; 6 Geo. I, c. 23.

⁴ See *supra*, on Bentham, chap. ii, sect. ii.

⁵ 19 Geo. III, c. 74.

⁶ 19 and 34 Geo. III.

sending out convicts to establish a colony in New South Wales. "It was, perhaps, the boldest and most unpromising project ever held out to any Administration. The colony was to consist entirely of the outcasts of society and the refuse of mankind, of persons who had not even been left to their own natural profligacy, but who had acquired a matured virility in vice by their education on board the hulks. . . . Instead of selecting persons who were acquainted with agriculture and the employments of a country life, the directors of the undertaking chose only those who had been convicted in London and Middlesex, and who, as inhabitants of a large city, might be easily conceived to be the most unfit persons for a new colony."¹ Now a penalty of this kind, observes Romilly, is inefficacious, as it is destitute of some of the indispensable qualities of punishment.² "The severity or lenity of the punishment depends not on the degree of guilt of the offender, but of his talents and acquirements and qualifications for the new state of things into which he is transported. . . . It is indeed a subject of very melancholy, and to this House of very reproachful, reflection, that such an experiment in criminal jurisprudence and colonial policy as that of transportation to New South Wales should have been tried; and that we should have suffered now four-and-twenty years to elapse without examining or even inquiring into its success or failure."³ Moreover, no provision was made for the return of transported convicts after the expiration of their term of punishment. "Left to go back to their native country as they can, their only resource is to work their passage home as sailors; but this is a resource only for the strong and healthy. To the sickly, the aged, and infirm, the sentence, which by law is limited to a certain number of years, becomes in fact a sentence for life. With women it necessarily becomes such a sentence in every case."⁴ Further, transportation was often inflicted at quarter sessions, even for petty larcenies not attended with circumstances of aggravation; and sometimes also on boys of tender age. Again, many were transported who had only a short period of their term of imprisonment unexpired; and many—according to the avowal of the judges themselves—were sentenced to a longer term than their crimes deserved in order to secure their

¹ *Speeches*, vol. i, pp. 250, 251.

² Cf. with Romilly's observations Bentham's criticism, *supra*, chap. iv, sect. iii.

³ *Speeches*, vol. i, pp. 268, 269.

⁴ *Ibid.*, pp. 271, 272.

being transported, as prisoners sentenced only to seven years' transportation were usually kept for that period on the hulks.¹

Finally, imprisonment in the common gaols, Romilly urged, needs drastic reform. Prisoners ought to be carefully separated according to age, sex, character, nature of crimes committed. Owing to the practice of indiscriminately confounding them together, those imprisoned for the first offence become hardened, desperate, and matured in villainy. Suspects, who may indeed prove to be perfectly innocent, are mingled with offenders of the greatest malignity. Besides, the structural and sanitary conditions of prisons should be ameliorated, and the entire system of management, organisation, and supervision thoroughly regularised. Solitary imprisonment is to be condemned, unless it is, in proper cases, combined with useful labour. To immure a human being within a solitary cell is frequently a form of punishment worse than death.² "It has been justly observed [Romilly is thinking of Bentham's doctrine] that the best punishments are those which inflict the least suffering upon the convict, but inspire the most terror in others. The punishment of solitary imprisonment reverses this rule. . . . In many instances it is said to have produced despair and madness. It is a punishment too easily abused to be safely left to the discretion of justices of the peace."³ Romilly vigorously protested also against the penalty of solitary confinement, for unlimited periods, allowed by private acts of parliament in workhouses for such offences as using abusive or improper language, or other misbehaviour.⁴

(vii) PREVENTIVE MEASURES

Preventive measures are of much greater importance than punitive provisions. The causes of the greater part of crime are poverty and ignorance. Therefore it is incumbent on the state to assist the poor to find employment, and to furnish means for educating the people. "Every order of society has an equal interest in the security and inequality of property. However some may partially and for a time be blinded to the knowledge of this incontrovertible truth by ignorant and presumptuous enthusiasts, the certainty of it must in the long run be brought home to their convictions. But they can only be taught this by the force of

¹ *Memoirs*, vol. iii, pp. 70-72.

² *Ibid.*, pp. 279, 280.

³ *Speeches*, vol. i, p. 253.

⁴ *Ibid.*, p. 283.

reason. Education will enable them to distinguish between the productions of enlightened men and the unmeaning nonsense with which it is sometimes attempted to mislead their understandings. Every other effort must be vain. To diffuse truth or repress error by force is no more practicable than to take a besieged town with syllogisms." ¹

The terror inspired by the threat of severe punishment is not the best means of preventing crime. "Ought it not rather to be said that the most likely means are to preserve uncorrupted that large but unfortunate description of persons who, being born in misery and indigence, and differing from us in nothing but the accidents of rank and fortune, are entitled to our utmost care and protection? For, if we negligently suffer a thousand sources of profligacy and encouragements to vice to surround these helpless creatures on every side, what a refinement of cruelty is it to hang the thieves and profligates whom we have made, and whose only crime was that they had not such uncommon philosophy and resolution as to be able to resist the temptations with which we have ensnared them?" ² Thus it is the duty of the government to contrive such provisions as will prevent the poor, the ignorant, and those lacking self-control from resorting to drunkenness, gaming and idleness, which are the forerunners of so much vice; and "to suppress those disorderly houses and seminaries of thieves, which are notorious to all the officers of the police, but which it is the interest of all should continue and should thrive." ³ Now to fulfil these objects it is indispensable to secure that only gentlemen of education, character, and property should be appointed justices of the peace, and also to establish a better, more efficient system of police in order to ensure constant vigilance and quick detection of crime.⁴ Romilly describes the prevailing practice of giving rewards "for the apprehension and conviction of offenders of some descriptions, such as burglars and robbers on the highway, as extremely pernicious; since it gave a direct interest to the police officers and thief-takers that crimes of great atrocity, but extremely profitable to them, should greatly multiply." ⁵

Next, it is essential to effect a substantial revision of our criminal law. The rigour, the barbarities, the confusions, the ill-directed provisions, the defective penal institutions have

¹ *Speeches*, vol. ii, pp. 180, 181.

² *Ibid.*, pp. 97, 98.

³ *Ibid.*

⁴ *Observations*, p. 95.

⁵ *Memoirs*, vol. iii, pp. 5, 6.

survived so long, not through our incompetence in the work of legislation, but on account of a fatal indifference to the public welfare.¹ The existence of so many offences that are capital, the frequent application of the death penalty, the custom of public executions, all exert a brutalising influence on the people; and rather than operate to deter from crime, these circumstances actually—it may be in an indirect manner or by subconscious suggestion—conduce to its commission. The frequent exhibition of horrible death scenes merely corrupts spectators, makes them more desperate, by emphasising the law's unrestrained ferocity; bystanders imagine they see “revenge sanctified by the legislature.” Where the moral character of people is depraved, crimes will be common and atrocious.²

Again, the whole system of judicial administration must be reorganised on rational lines, so as to secure full justice, impartiality, equality of treatment, trials without undue delay, and a simplified, inexpensive, unprotracted procedure.

Finally, it is of the utmost importance to alter the conditions of prison life, to remove the numerous abuses and irregularities, and make good the deficiencies mentioned above, so that convicts may not become worse than they originally were. Speaking of such a project as the one prepared by Blackstone and Eden for the erection of penitentiary houses, Romilly observes, in a tone of hopefulness and optimism: “This plan promises to subdue the fiercest and most ungovernable spirits by solitary confinement and continued labour; it would be a kind of asylum to that very large description of offenders who are rendered such by the defects of education, by pernicious connexions, by indigence, or by despair. These it would keep apart from their infectious companions. It would instil into their minds principles of religion and morality, instruct them in useful trades, and furnish them with resources to become valuable members of society when restored to their liberty.”³

¹ *Observations*, p. 105.

² *Ibid.*, p. 31.

³ *Ibid.*, p. 60.

CHAPTER III

ROMILLY'S PERSONAL CHARACTERISTICS AND POSITION

IT is well to devote a separate chapter, however short it may be—and inadequate it must necessarily prove—to describe the great abilities, the distinguished personality, the truly glorious character of Romilly.¹ In the case of some men of distinction, their labour and their personality may be considered apart; there are others, however, whose work and achievements are so closely connected with their character that to dissociate them and regard them as separate entities is to lose much of the lustre shed on the world by their intimate union. Of this latter class Romilly is a notable example.

The passing away of Romilly was really felt by his contemporaries as an incalculable loss to them—not the kind of loss that is for a brief season spoken of in obituary fashion. Thus writes a contemporary who possessed a deep knowledge of human nature and of the affairs of the time: “. . . I must advert to the great calamity we have all sustained in the death of poor Romilly. His loss is perfectly irreparable. By his courageous and consistent public conduct, united with his known private worth, he was rapidly acquiring an authority over men's minds that, had his life been spared a few years, would, I think, have equalled, if not surpassed, even that of Mr. Fox. He indeed was a *leader* that all true whigs would have been proud to follow, however his modesty might induce him to decline being called so.”² Men lamented that no longer would his vigilance protect them from the arbitrary encroachments of authority and restrain the abuses of power, no longer would his eloquence plead the cause of right, justice, and humanity, no longer would

¹ The present writer cannot refrain from devoting an entire chapter for this purpose, partly because of his own deep regard for the memory of Romilly (who is not as well known to his countrymen as he ought to be), and partly because in these days of perplexed democracy, whose welfare depends on wise and good leadership, we cannot too much dwell on and contemplate worthy models of character, capacity, and distinction, and hold them up as examples to inspire and stimulate those who assume the privileges and cares of public life.

² Thos. Creevey, M.P., writing to Hon. H. G. Bennet, M.P., December 30, 1818 (*The Creevey Papers*, edited by Sir H. Maxwell (1904), vol. i, p. 290).

bigotry and persecution behold in him the unwavering antagonist, no longer would the weak and the wretched find in him an untiring defender. His place in the forum, in the senate, in the country had suddenly become vacant, and men felt that it would long remain so.

In him were united a rare assemblage of qualities, physical, intellectual, and moral. His figure was tall and graceful, his complexion dark, his aspect somewhat grave until lightened by a smile; his features were regular, the general contour of his countenance indicated benignity and benevolence, his bearing and manner frequently revealed a contemplative, brooding disposition.

He was almost puritanically austere, self-denying in regard to the pleasures of the world. His highest delight he found in the tranquillity and beauty of the country and in the society of his family, which he ever deemed "the greatest of earthly blessings." In a world obsessed so much by the maladies of a factitious cynicism and disillusionment it is good to hear of Romilly's love of home, whole-hearted devotion to his children, and ever-increasing affection for his wife. Throughout his life he preferred simplicity, and turned away from the mimic grandeur, the hollow show and pomp of men and things. The refulgence of royal courts, the allurements of "brilliant functions" offered no attraction to him. On one occasion when he was invited to a grand dinner given at the Guildhall to the Regent, the Emperor, the King of Prussia, and others only a little less exalted, he did not go; he preferred to meet on that date Alexander Humboldt, the eminent naturalist and traveller, at the house of his esteemed friend Lord Lansdowne. He paid heed to real worth rather than to superficial dignity. He cared not for the glammers of high office or for the mere dignity of distinguished station. High office held only for the purpose of promoting the good of the community alone commanded his respect. The humble quiet ways of life, wherein he could worship at the shrine of truth and justice, were more lovely to him than the exclusive regions reserved for elevated rank. It was no pleasure to him, as it is to those of less ascetic mould, "*monstrari digito prætereuntium*." In his private life and in the society of congenial friends he was amiable, cheerful, natural; and the reserve and reticence invariably manifested in public were then relaxed.

Romilly was given to communing with himself. He wrote

several letters to himself, in which he pointed out what should be his aims and duties in offices he might occupy. These writings testify to his salutary habits of self-examination, his efforts to prepare himself for any emergency, or for any public function he might be called upon to discharge, his anxiety to determine beforehand the course of conduct to be adopted in such cases, and—as he himself expresses it—“to record against himself the obligations” that would be binding on him. In the first letter (dated 1801), supposed to be addressed by “some intimate friend to a barrister who might form expectations of rising to the highest eminence in his profession,” the writer expresses great pleasure at the other’s success, and says it would have given “our dear Roget,” if he were living, unspeakable satisfaction “to see so much of his predictions accomplished, to exult in your success and to enjoy your reputation.” He goes on to say that the doings of the past are as nothing when compared with the demands and possibilities of the future. “I would have you familiarise yourself with the idea of becoming a benefactor, not to individuals only, but to a whole nation, and to future ages; in short, I would have you prepare yourself for that eminent station which it is not impossible, or, if I were to express myself as sanguinely as I feel in common with many of your friends, I should say it is not improbable, that you may one day fill.”¹ He emphasises the importance of the Lord Chancellor’s position, the good he is able to do in judicial work, in parliament, in advising the council, in the exercise of his patronage, and, above all, in introducing desirable reforms in the civil and criminal jurisprudence of his country. And he concludes by warning the candidate for such a post to be on his guard against tainting his mind by professional habits, or infecting it with those prejudices usually contracted by an advocate in the course of his practice.

His expectations were never fulfilled; but he never cherished the least rancour against his opponents, he never spoke bitterly of the condition of affairs that defeated his hopes of attaining that goal for which no man was ever more fitted. Conspicuous among his moral qualities were sincerity and disinterestedness; pure, transparent disinterestedness—that choicest flower of civic virtue. The whole course of his public life was characterised by inflexible consistency which was as beautiful as it was rare in an age of adulation and time-serving, in an age when men

¹ *Memoirs*, vol. iii, p. 380.

sought office for the sake of stipend and fees, or in order to satisfy petty ambitions. For what he conceived to be his principles and public duty he sacrificed, without hesitation, without the least inward conflict—so surely had he hitched his waggon to a star—no uncertain chances of promotion to the highest dignity, he sacrificed his health, his professional emoluments, the pleasures of his delightful domestic life. Even in the capacity of a law officer of the Crown he continued unflinchingly to be an advocate for the people, their defender against oppression, an opponent of judicial partiality and misused discretion, of legislative vagaries, of departmental aggression. Bentham was his friend, in some respects his master and inspirer, who was extremely sensitive to criticism, who took offence but too easily when his favourite notions were concerned, and who was a formidable unsparing adversary when aroused. Romilly throughout had great regard and admiration for him; but when occasion demanded he did not hesitate to point out plainly defects in the views and arguments of his master. The result showed that Bentham, though easily surpassing his disciple in the power of devising political and legislative schemes, was far from equalling him in magnanimity of character. Bentham's extraordinary intervention in a political election to the disadvantage of Romilly failed to impair the latter's respect and friendship. On another occasion the demands of sincerity and single-mindedness brought about a breach of his long-established friendship with Perceval. Romilly says that when he met the latter on circuit, in the early part of his career, he found him possessed of little reading and strong prejudices on many subjects; "yet, by his excellent temper, his engaging manners, and his sprightly conversation, he was the delight of all who knew him."¹ Later, however, Romilly felt compelled to discontinue intimate intercourse with him in private, as he had every day to oppose him in public, and took exception also to the way Perceval "obtained the situation of Prime Minister." Romilly's own account of the matter will show the exclusive dominion of his rigid principles. "As a private man," he observes, "I had a very great regard for Perceval. We went the same circuit together, and for many years I lived with him in a very delightful intimacy. No man could be more generous, more kind, or more friendly than he was. No man ever in private life had a nicer sense of honour. Never was there, I believe, a

¹ *Ibid.*, vol. i, p. 91.

more affectionate husband or a more tender parent. It did not proceed from him that of late years¹ our intimacy was totally interrupted. He would, I have no doubt, have been glad to have obliged me in everything that I could have wished; and that without any view of detaching me from my political friends, but from personal regard to me. It was I who refused his repeated invitations and shrunk from his kindness and friendship: for I could not endure the idea of living privately in intimacy with a man whose public conduct I in the highest degree disapproved, and whom, as a minister, I was constantly opposing. I cannot indeed reconcile to my way of thinking that distinction between private and public virtues which it is so much the fashion to adopt. It may be called liberality, or gentlemanly feeling, or by any other such vague and indefinite term; but it is not suited to anyone who is really in earnest and sincere in his politics.”² To some people this attitude may perhaps savour of exaggerated scrupulousness. But censors of Romilly’s rigid adherence to principle should remember that nowadays circumstances are different, that the various relationships of life are more complicated, that compromise is facilitated, that it is become customary to adjust—indeed sometimes to surrender—ideas to material or social interests. Well, let us, if we be so minded, condemn Romilly for carrying his principles too far, for sacrificing so much for an idea. But let us also bear in mind that many men have laid down their lives for an idea, and have thus revealed the difficult way to their fellow-creatures, who were frequently only too ready to stigmatise them as visionaries or fanatics. A modern moralist has said: “A foolish consistency is the hobgoblin of little minds.” True! But the consistency of men prepared to die for their principles, of men like Romilly, ever animated by an exalted sense of duty, is a beautiful and supremely wise consistency inherent in noble minds, and necessary for the realisation of their lofty ideals.

And so conformably to his views he disregarded exceptional opportunities he had for securing his advancement. When the Prince of Wales was anxious to consult him concerning the affairs of the Princess,³ he persisted in refusing advice, because, as the matter had become one of public importance, he conceived it to be the duty of the Prince to consult his responsible ministers.

¹ Romilly is writing under date May 16, 1812.

² *Memoirs*, vol. iii, pp. 37, 38.

³ In 1813.

It was reported to Romilly that on one occasion¹ the Prince Regent spoke of him in a friendly manner, and, deploring his politics, said it was his own fault that his juniors and his inferiors were passing him in the honours of the profession. To which Romilly replied: "How little does the Prince know me, if he imagines that the promotions which have taken place, or any of those which may follow, have excited, or are likely to excite, in my mind any feeling of regret."² Sir James Mackintosh declared³ that Romilly's moral character stood higher than that of any other conspicuous Englishman then alive. And in reference to the part played by Romilly—despite the warning of the King—in the inquiry into the affair of the Duke of York, the same writer observes: ". . . I envy Romilly neither his fortune nor his fame, though I am likely to be poor and obscure enough, but I do envy him so noble an opportunity of proving his disinterestedness. If his character had been in the slightest degree that of a demagogue, his conduct might have been ambiguous; but with his habits, it can be considered only as a sacrifice of the highest objects of ambition to the mere dictates of conscience. I speak so because, though I trust that he will not lose the great seal, yet I am sure he considered himself as sacrificing it; and to view it in any other light would be to rob him of the fame which he deserves."⁴

No! Romilly detested the part of a noisy demagogue as much as that of a smooth-tongued courtier. Before political elections he was wont to inform the electors that it was his settled resolve to preserve his independence of mind and action, and not to make promises beforehand to promote this or that measure or vote for one policy or another. When he was invited to be a candidate for Bristol, he declared, in expressing his willingness to stand, that he refused to solicit the votes of the electors "by the personal attentions, and individual flatteries, and the other little artifices which are so often resorted to at elections." The only means of canvassing their votes that he would adopt would be "by a close attendance in parliament, and by an anxious care not to neglect my public duty."⁵ Afterwards, in the course of his address to the electors, he emphasised that he had no professions to make them, except that he would persevere in the line of conduct

¹ In 1816.

² *Memoirs*, vol. iii, p. 250.

³ Writing in his journal, July 18, 1810, in *Memoirs of the Life of Sir J. Mackintosh*. Edited by his son, R. J. Mackintosh. 2 vols. (London, 1835); vol. ii, p. 34.

⁴ From a letter dated October 15, 1809.

⁵ *Memoirs*, vol. iii, p. 8.

that had already gained their approbation. He assured them that one of the reasons for refusing to canvass was the respect he had for them; "that votes which were not asked for acquired a value from the very circumstances of their being unsolicited; that, as such votes could only be given for public motives, they were always honourable both to the giver and to those for whom they were given. . . ." ¹ A similar attitude was adopted by him in the case of the Westminster election; and after he was returned for that city, he said: "I am the servant of the people, but I am determined not to be their slave; and I should think the proud distinction which has been conferred on me had lost half its value if it had been obtained, or was to be preserved, by acting the part of a factious demagogue. . . . No conduct can, in my eyes, be more criminal than that of availing oneself of the prejudiced clamours of the ignorant or misinformed, to accomplish any political purpose, however good or desirable in itself." ² He was against the practice, so much fraught with abuse, of buying and selling parliamentary seats; but he preferred to pay thousands for a seat rather than go to the House of Commons as a nominee of some patron who might in the least interfere with his views or with his conduct.

As a lawyer, as a politician, as an orator, Romilly possessed the highest attainments. Considering his early difficulties, his literary culture was remarkable. Scholarship in the strict sense he had not. But he had a wide and a deep knowledge of the Latin and English literatures, and had read a good deal of the French classics. His style, even judged from his fragmentary memoirs, is marked by ease, moderation, directness, clearness, simplicity, and flexibility; rhetoric, over-elaboration, florid ornament were absent from his writing as from his speeches.

Romilly was undoubtedly one of the ablest lawyers of his time. Indeed, in the opinion of Brougham, he was the first advocate and the profoundest lawyer of his age. Disraeli makes a character in one of his novels say: "To be a great lawyer I must give up my chance of being a great man." If this remark is true generally, Romilly certainly proved a signal exception. He became a great lawyer, and also attained to real greatness as a man. He possessed a comprehensive knowledge of the law and of the practice of the courts in which he appeared. His advocacy and his opinions were eagerly sought. His power,

¹ *Memoirs*, vol. iii, p. 22.

² *Ibid.*, p. 412.

rapidity, and precision in unravelling the intricacies and penetrating the obscurities of a case, and the intuitive insight with which he grasped the merits of a contention, were recognised by bench and bar alike. Thanks to a retentive memory, which was backed up by careful preparation, he was able to expound a complicated issue without reference to brief or notes. The court was always impressed by his serious manner, quiet earnest appeal, and singular prudence in setting forth his client's claims; and when the presiding judge expressed contrary views, he did so with diffidence. To his juniors he was courteous and encouraging, though sometimes, by reason of a certain nervous irritability, he found it difficult to bear with obtuseness or unreadiness. With the illogical, irrelevant arguments and technical sophistries of opponents he showed no patience; he exposed them mercilessly, poured on them contempt, all the more telling through being restrained, and with consummate self-command laid bare the meagre foundations on which they rested. "When vice was to be lashed or justice vindicated, the public delinquent exposed or the rational oppressor overawed,"¹ the vigour and severity of his invective never failed to produce a great effect. His opinion of contemporary legal practitioners in general does not appear to have been a very high one; he took such a lofty view of the profession and weighed its members in such an exacting balance, that the majority were, naturally, found wanting.

Both at the bar and in the House of Commons his speech was distinguished for its good taste and discretion, for its chaste, elegant, precise, direct, perspicuous character, for the strength and variety of its expression, and for the clearness of its arrangement. A serious demeanour and dignified bearing intensified the cogency of his argument and the zeal of his advocacy. The apparent ease of delivery, added to impressiveness and unassuming suavity of manner, gained the attention of all present. His addresses had none of that elaboration which frequently makes speakers' efforts stilted and artificial; they were destitute of rhetorical flights and ornamental figures. Simple, unaffected, without long, roundabout introductions they went straight to the heart of the subject dealt with, and soon unfolded the essential question at issue. They appealed to the intelligence rather than

¹ Lord Brougham, *Historical Sketches of Statesmen who flourished in the time of George III* (London, 1839); First Series, p. 296.

to the sentiments of hearers. In his replies and rejoinders to opponents he was always resourceful, unhesitating, fluent, to the point, and invariably seized upon what was fallacious, immaterial, and untenable in their arguments. The words used by Romilly of Horner's eloquence may be applied, much more appropriately to his own: it was "not merely calculated to excite admiration and vulgar applause," but was "ennobled and sanctified by the great and virtuous ends to which it was uniformly directed, the protection of the oppressed, the enfranchisement of the enslaved, the advancing the best interests of the country, and enlarging the sphere of human happiness."¹ Let the testimony of Brougham—no mean judge of oratory—sum up Romilly's qualities. His eloquence, he says, "united all the more severe graces of oratory, both as regards the manner and the substance. No man argued more closely when the understanding was to be addressed; no man declaimed more powerfully when indignation was to be aroused or the feelings moved. His language was choice and pure; his powers of invective resembled rather the grave authority with which the judge puts down a contempt or punishes an offender, than the attack of an advocate against his adversary and his equal. His imagination was the minister whose services were rarely required, and whose mastery was never for an instant admitted. His sarcasm was tremendous, nor always very sparingly employed. His manner was perfect, in voice, in figure, in a countenance of singular beauty and dignity; nor was anything in his oratory more striking or more effective than the heartfelt sincerity which it throughout displayed, in topic, in diction, in tone, in look, in gesture." ■

Romilly was as great a politician and parliamentarian as he was a lawyer. Despite the arduous and unremitting demands of his profession, he did more than justice to his parliamentary duties. He entertained a lofty conception of them, and was thoroughly imbued with their spirit. He believed that the most splendid talents in a minister would not make him a great man, if he had done little to ameliorate the condition and increase the happiness of his fellow-subjects. Of the law Burke remarks that "it is one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together; but it is not apt, except in persons very happily born, to open and liberalise

¹ *Memoirs*, vol. iii, p. 282.

² Brougham, *op. cit.*, pp. 293, 294.

the mind exactly in the same proportion." In this respect, Romilly was indeed very happily born. Distinguished lawyers have rarely attained eminence in parliament. Romilly was an exception. He was able to discriminate between the methods and requirements of the courts and those of the House of Commons, and could adapt himself accordingly. When the Duke of Wellington once¹ observed to Creevey that lawyers were never liked in the House of Commons, the latter replied that it was true generally, but not in the case of men like Romilly and Horner; and he added "that they were no ordinary, artificial, skirmishing lawyers, speaking from briefs, but that they conveyed to the House, in addition to their talents, the impression of their being really sincere, honest men."² Romilly had been early associated with some of the leading spirits of the French revolutionary epoch, and—whether through this or any other circumstance—he had at the commencement of his career shown a leaning to "liberal" views in politics. Accordingly he attached himself to the whig party, and, though never a pronounced partisan, he was habitually favoured with confidential communications from its leaders long before he became a member of parliament. He was ever inflexibly consistent in his opinions and in his conduct. He regarded his political creed with the "high seriousness of absolute sincerity"; indeed, to such an extent that he was prepared to sacrifice friendship and affection to his uncompromising ideals and beliefs. Every subject he took up he conceived on the broadest grounds of public policy, justice, equity. Principles had greater weight with him than had mere precedents; on one occasion he emphatically refused—to the dismay of the House—to accept a precedent established by Pitt's authority; in his view it conflicted with what he held to be considerations of reason. The great object of his political exertions was legal and political reform—especially the eradication of the barbarous and irregular elements of the criminal code, the mitigation of penal rigour, the prevention of administrative and judicial abuses, the establishment of new provisions demanded by an advancing civilisation, the removal of useless technicalities, the simplification of the whole system of jurisprudence, the extension of liberty, the prevention of cruelty in every form. And so he was ever ready, also, to champion the cause of the poor, the weak, the oppressed, the victims of injustice, the victims of a

¹ In the summer of 1818.

² *Creevey Papers* (1904), vol. i, p. 278.

rigorous application of a vicious effete law; he was ever ready to plead for mercy, for religious toleration, for emancipation from old shackles, for comity and friendliness between the nations, for universal charity and goodwill. "The friend of public virtue," said Brougham, "and the advocate of human improvement will mourn still more sorrowfully over his urn than the admirers of genius, or those who are dazzled by political triumphs. For no one could know Romilly, and doubt that, as he only valued his own success and his own powers in the belief that they might conduce to the good of mankind, so each augmentation of his authority, each step of his progress, must have been attended with some triumph in the cause of humanity and justice." ¹

Whether his work in the law-courts or that in parliament be considered, we find that Romilly, of French descent and English parentage and upbringing, combined in himself many of the best attributes of the French and English characters. His kinship with the French is noticeable in his logical mind, in his unwillingness to brook inconsistency between actual practice and accepted theory, in his impatience of antiquated methods and products, in his readiness to propose or countenance innovations, even such as less bold spirits might deem revolutionary. But he was English in the sense that he favoured innovation not for its own sake or simply for making a breach with the past, but rather on the ground that it was based on conceptions of utility and well-considered expectations of improvement. He was French, again, in his clearness of thinking, in his tendency to carry premises to their legitimate conclusions, to formulate principles in comprehensive generalisations, to look at this or that institution as part of an entire system, and to demand that that system be harmoniously constituted; French also in his clarity, directness, definiteness, precision, brevity, simplicity of spoken and written language, marked by classical reserve, balance, coherence, and sometimes revealing a restrained, subtle irony. But he was English in his level-headedness, in his practical spirit, in his drawing of conclusions from a large number of facts and not from exceptional cases or from imagination, in his dogged untiring perseverance, patience, steadfastness of purpose, courage and tranquillity in defeat, modesty in victory, in his content with small results backed up by hopefulness and determination to accomplish more, in his consciousness of doing his duty.

¹ Brougham, *op. cit.*, pp. 292, 293.

Was there a shade in the picture? It were arrant blindness to declare that there was none whatever. The little that there was helped to heighten the brilliance of the light. One opponent complained of Romilly's oracular way of laying down the law in the House; another found fault with his impatience of contradiction; a third spoke of his prepossessions in favour of those who held opinions similar to his own; a fourth reproached him for venturing to apply his own criterion to test the greatness of a man, and so on. But whatever faults he had proceeded, obviously, from an excess of his virtues. The magnificence of the sun is but little impaired by a few insignificant spots.

What then, in conclusion, are the achievements of Romilly? He achieved a noble life, a life "*sans peur et sans reproche*," distinguished by a number of such qualities as are rarely found in the sons of men. In an age marked by self-indulgence, he showed that the possession of worldly means is not inconsistent with a temperate, ascetic life. In an age of place-hunting, duplicity, tergiversation, he showed that a politician's life may be unselfish, straight, honourable, constant, unblemished by unworthy ambition, of unsullied purity. In an age when lawyers were generally regarded as adepts in the arts of chicanery and over-subtle argumentation, and as being disposed to bend truth to their own purposes and to make the worse appear the better reason, he showed that the legal profession can be the noblest. With Promethean courage, nourished by a love for mankind, he endeavoured to make whole a law of shreds and patches. He tried to make straight that which was crooked. In the face now of a hostile parliament clamouring for the indiscriminate application of the sternest measures, now of an apathetic assembly, deaf to appeals for reason and humanity, and blindly attached to tradition and to the barbarous systems of a bygone age, Romilly again and again showed that the inept superstitions as to the supreme wisdom of our ancestors' contrivances and the incomparable perfection of the heritage left to us were unfitted to meet the needs of a progressive society; he again and again demanded substantial changes, and introduced new measures of reform. For the people, the penal code was wrapped in lugubrious obscurity. Romilly threw light on it. Judges and legislators deemed it an excellent structure that should not be interfered with—unless it were to add to its rigour and complexity. Romilly laboured to prove to them that the inconsis-

tencies, the barbarities, the cruelty fanned the very flames of criminality that they were meant to allay. The lawyers regaled themselves with its numerous fictions and technicalities. Romilly, the greatest lawyer of them all, exposed the irrational, absurd nature of those technicalities, which gave rise to so much subterfuge and injustice, and urged that clearness, simplicity, intelligibility were indispensable. But he tried to convince men who were for the most part not open to conviction. He tried to lead them into new ways; but through their unreasoning, besotted attachment to the old ways they were loth to budge. And his efforts were made not by a persistent volley of books and pamphlets that might be read and pondered by the multitude, and so stir up public opinion in his support; they were made by the fleeting vehicle of oral utterance directed to hostile auditors who, even if they were momentarily influenced by the speaker, were yet able in their obstinate perversity to vote against him. So the number of legislative changes he effected appears small in comparison with his great efforts. But his seemingly lost labour was not in vain. In his lifetime he—a daring pioneer—reaped scanty fruit; his successors, however, gathered and are still gathering a rich harvest due to his sowing. He made it infinitely easier for the generation coming after him to dispel the old errors, prejudices, and tyrannies, to shake off the bondage of noxious traditions, and to introduce in criminal law numerous salutary changes of an almost revolutionary nature. Accordingly, his work occupies a place of supreme importance in the evolution of English jurisprudence.

Our great men are our most precious inheritance. Let us, then, with pride and exultation, perpetuate and cherish their memory, so that, by reflecting on their lives and deeds, our souls may grow up to the light.

INDEX

INDEX

- ABOLITIONISTS, slave trade. *See* Slave trade
- Accademia dei Pugni, 5, 9
- Accessory Offences, 223
- Accusations, Secret, 74
- Actions, fictitious, 233
- Adam Smith, Beccaria's teaching and that of, 22; on poor law system, 155
- Addison's *Spectator*, *Il Caffè* modelled on, 7
- Æsthetics, Beccaria and German writers on, 8
- Aggravation, jury's function in questions of, 301, 313
- Alarm, effect of motives on, 197; influence of facility or difficulty of preventing offences on, 197
- Alberoni, Cardinal, 87
- Aliens, 284
- Amalry, 90
- America, penal law in, 99; transportation to, 209
- American Declaration of Independence, Bentham on the, 117
- Anarchical Fallacies*, 125
- Animals, cruelty to, 233, 262
- Antiquity of law as criterion of its justice, 295-7, 310
- Aragon, immunity of, from torture, 35
- Arrest, for libel, 281; on mesne process for debt, 281
- Asaph, Dean of St., 248
- Assets, freeholds as, to pay simple contract debts, 255, 276, 278
- Attainted traitors, punishment of, 308
- Auckland, William Eden, afterwards Lord. *See* Eden, William
- Augustine, St., and torture, 32
- Austria, influence of the Encyclopædists on Joseph II of, 88; reform movement in, 93
- Ayrault, Pierre, 33, 33ⁿ.
- Bacon, D'Alembert's classification of knowledge on basis of conceptions of, 42; and punishment for treason, 309
- Banishment, 68
- Bankruptcy laws, Beccaria's attitude towards, 66; Bentham's view of, 187; Romilly's bill to improve, 261, 306, 307
- Barbadoes, slaves in, 278
- Bayle, Pierre, 33
- Beccaria, Cesare Bonesana, Marchese di, life of, 3-26; ancestry, 3; birth-place, 3; dislike of dogma, 3; education, 3; parentage, 3; adherent of Encyclopædists, 4; *Persian Letters*, 4; French literature, 4; meets Diderot, 4; studies law, 4; meets Teresa di Blasco, 4; first marriage, 5; contact with Pietro Verri, 5; his first published work, 6; *Dei delitti e delle pene*, 6; *Il Caffè*, 7; *Fragment on Style*, 8; *Periodical Newspapers*, 8; *Pleasures of the Imagination*, 8; Voltaire's *Commentary* and the *Dei Delitti*, 10; reception of the *Dei Delitti* throughout Europe, 11, 83-106; attacks on, 13-15; visits Paris, 15; appointed professor of political economy, 21; a councillor of state, 22; second marriage, 22; serves on commissions of inquiry, 22; his death, 22; his characteristics, 22-5; attitude towards torture, 33; relationship to contemporary reformers, 37; attitude towards capital punishment, 69; on evidence, 75; refutation of torture, 78; penal doctrine summarised, 82; his relationship to reform movement in general, 85; Bentham's indebtedness to, 89; influence of teaching on English lawyers, 90; influence on America, 99; characteristics of his work summarised, 99; defects of his work, 102
- Benedict XIV, influence of Voltaire on, 87
- Benefit of clergy, 234; transportation without, 315
- Benevolence, legislation and the sentiment of, 224, 301
- Bentham, Jeremy, disciple of Beccaria, 92; birth and parentage, 109; his early reading, 109; formative influence of the *Télémaque*, 110; school life, 110; at Oxford, 112; called to the bar, 113; dislike of legal career, 114; greatest happiness principle, 116; *Critical Elements of Jurisprudence*, 117; *Fragment on Government*, 117; *Rationale of Punishments*

- and Rewards, 120; "Panopticon" scheme, 120; Shelburne's friendship for, 121; attachment to Miss Fox, 122; *Introduction to the Principles of Morals and Legislation*, 122; *Defence of Usury*, 123; meets Mirabeau, 125; *Anarchical Fallacies*, 126; prison reform, 127; Parliamentary adoption of Panopticon scheme, 129; French citizenship conferred on him, 132; on law taxes, 132; on intestate succession, 133; on poor laws, 134; *Traité de législation civile et pénale*, 135; on Parliamentary reform, 137; removal to Ford Abbey, 138; attitude towards theology, 139; relationships with the United States, 143; establishes the *Westminster Review*, 143; *Constitutional Code*, 143; *Justice and Codification Petitions*, 145; his death, 146; characteristics, 148; conditions of age in which he lived, 152; contemporary philosophy, 157; on transportation, 175; his ethical doctrines, 180; his political speculations, 183; favours individualism, 183; his theory of government, 184; political economy, 184; his theory of legislation, 185; principles of criminal jurisprudence, 189; view and treatment of penal law, 191; his method, 193-5; on capital punishment, 214; his literary activity, 227; his errors of psychology, 228; his shortcomings, 228; his influence, 229; Whewell on, 231; list of reforms due to, or showing kinship with his teaching, 233; his handbill against Romilly, 284, 323
- Bicêtre, prison of, Romilly's pamphlet on, 250
- Biffi, 9
- Bill of Rights, and practice of torture, 34
- Blackstone and the *Dei Delitti*, 11, 89; and witchcraft, 57n.; influence of Beccaria on his *Commentaries*, 90; Bentham on, 112, 118; his hostility to reform, 118; bill on prison treatment, 177
- Blasco, Domenico di, 4
- Boccaccio and torture, 33
- Bodin, Jean, on torture, 33
- Bonesana, Cesare, Marchese di Beccaria. See Beccaria.
- Bossuet, 88
- "Bridewell," a, 173
- Brissot de Warville, 93, 99
- Brougham, Bentham on law reform of, 142; on slave trade, 278; on Romilly's qualities, 328
- Bruno, Giordano, 24; attitude towards torture, 35
- Buffon, contributor to the *Encyclopédie*, 41; tribute to the *Dei Delitti*, 83
- Burdett, Sir Francis, a supporter of Bentham, 141; Romilly's support of, 267
- Burgage-tenure boroughs, 253
- Burke, Bentham's opinion of, 150; *Reflections*, 161; on industrial liberty, 163; on measures of criminal reform, 178
- Caffè. See *Il Caffè*
- Calas, defence of, 9, 10, 51, 86
- Calderari, 9
- Camden, Lord, Bentham's opinion of, 121
- Campanella, 35
- Campomanes, 90
- Canning supports Romilly's bills on penal reform, 265
- Capital offences in England, 170
- Capital punishment, 69; Rousseau and, 69; ineffectiveness, 70; unnecessary and unjust, 71; Beccaria recommends abolition, 72; irreparable, 74; Marat and, 89; Condorcet condemns, 89; limited to high treason, 94; abolished by the Convention, 97; Kant's criticism, 102; Dr. Johnson's view, 188; Goldsmith on, 189; Bentham's arguments against, 214 *et seq.*; confined to murder, 233; Romilly's bills for abolishing the death penalty in certain cases, 262; Dugald Stewart on, 263; Dr. Parr on, 263; abolished in respect of vagrant soldiers or seamen, 269; debtors giving false accounts, 275; Paley on, 288; juries and, 293-4; arguments of Paley and Romilly contrasted, 302-5; for fraudulent bankrupts abolished, 307
- Carpzov, Benedict, 86
- Castro, Pedro de, 34
- Catechism of Parliamentary Reform*, Bentham's, 137
- Catherine of Russia. See Russia, Empress of
- Catholic disabilities, 277
- Cerrati, intervention of, in favour of Beccaria, 5
- Cervantes, opposition to torture, 33
- Chains, hanging in, 233
- Challenge jurors, right to, 75
- Chancellor, Lord, Romilly on importance of position of, 322
- Chancery suits, Romilly and delays in, 269
- Charitable trusts, 270
- Chastellux, 116

Chrestomathia, or useful education, 138
 Christian VII of Denmark, and Voltaire, 87
 Church of England, Bentham and the, 139
 Cicero, condemnation of torture, 32
 Cincinnati, American Order of the, 247
 Civil law, purpose of, according to Bentham, 185
 "Civilly dead," 76
 Clarus, Julius, 86
 Clemency. *See* Pardon, right of
 Clement XIV, influence of Voltaire on, 87
 Cobbett, Bentham's antipathy to, 138
 Cochrane's case, Lord, 298
 Code, of Criminal Investigation, 97; earlier English penal, 296
 Codification proposals of Bentham, 140, 231; Romilly on, 282
 Coke, opinion on practice of torture, 34; on incidents of punishment for treason, 309
 Coleridge, a supporter of the French Revolution, 162
 Colquhoun, Patrick, 133, 165; assistance schemes for discharged prisoners, 177
 Combination law, amelioration of, 233
Commentaire sur le livre des délits et des peines, 100.
Commentaries, Blackstone's. *See* Blackstone
 Common law, English, and torture, 34
 Companies, limited liability, 233
 Compensation for crime, 200, 226
 Condillac, a contributor to the *Encyclopédie*, 41
 Condorcet and capital punishment, 89; Romilly meets, 250
 Confiscation of property, 69
 Constantin, Jean, opposed to torture, 33
 Constitution, British, Bentham and the, 183
 Constitutional Code, Bentham's, 143
Contrat social, 88
 Convicts, hulks or galleys for, 175, 315; precautions on restoring to liberty, 211
 Corporal punishment, 310
Correspondance littéraire (1754-90), 88
 Corruption of blood, 273, 275, 309
 Council of Ten, system of procedure of, attacked by Beccaria, 13
 Courts-martial, sentence of flogging ordered by, 311
 Covarruvias, 86
 Creevy, Thos., on Romilly, 320, 329
 Cremani, L., 90
 Crime, prevention of. *See* Prevention of crime

Y

Crimes and punishments, Beccaria's work on. *See* *Dei delitti e delle pene*
 Crimes, true measure of, according to Beccaria, 59; intention of delinquent, 59; classified, 64 (*see also* Offences); proofs of, 75; evil of, depends on their consequences, 219; principal causes of, 226
 Criminal law, Voltaire's denunciation of, 51; abuses of, in England, 167; revision of English, required, 318-19
 Criminal jurisprudence, ferocity of Italian, 27, 30; Bentham's principles of, 189
 Criminal legislation, Beccaria and principles of, 4; during French Revolution, 96; inconsistency in and abuses of, in England, 168
 Criminal procedure in Bentham's age, 166
 Criminals, returns of, 276, 315; reformation of, 298
Critical Elements of Jurisprudence, 117.
See also *Morals and Legislation*, *Introduction to the Principles of*
 Cross-examination by judges, 313
 D'Alembert, admiration of, for the *Dei Delitti*, 11; Beccaria's description of, 17; a director of the *Encyclopédie*, 41; teaching of, 44; Romilly's description of, 244
 Damhouder, 86
 Debt, Bentham opposed to imprisonment for, 188; Romilly and imprisonment for, 256, 305, 306
 Debtors, fraudulent insolvent, Beccaria on punishment of, 66; Romilly's bill on, 275, 306
 Declaration of the Rights of Man, 97
Dei delitti e delle pene, 6; publication, 9, 10; Voltaire's defence of, 10; translated into English, 11; reprinted, 12; its style, 25; triumph of, 37, 100; questions examined in, 56; Roederer's translation, 82; influence on French penal legislation, 83; Romilly on, 243
Del disordine e dei rimedi delle monete nello stato di Milano nell' anno 1762, 6
De l'Esprit, 45, 115
 Delessert, Madame, 244
 Delfico, 90
 Democratic movement in England, 162
 Deserters, punishment of, 312
 Deterrents of crime. *See* under Punishment
Dictionnaire philosophique, defence of Beccaria in, 10

- Diderot, Beccaria and doctrines of, 4;
Beccaria's description of, 17; teaching of, in the *Encyclopédie*, 43; his criteria of penalties, 49; Romilly meets, 244
- Discretionary powers in judges, 302
- Disembowelling for treason, 274, 308
- Dumont, Bentham's friendship with, 124; *Traité de législation civile et pénale* issued in Paris, 135; Romilly meets, 244; Romilly's tribute to, in the House of Commons, 266; his evidence at inquest on Romilly, 285
- Dumoulin, Charles, 33
- Dundas, Henry, Romilly's part in the impeachment of, 254
- Dupaty, influence of Beccaria on, 86
- Dwelling-house, theft in a, 266; executions for, 292
- Economic Society of Berne, award of, to Beccaria, 11, 92
- Eden, William, on penal laws, 91; on penitentiaries, 319
- Edinburgh Review*, criticism of Bentham's *Traité* by the, 136
- Education, Bentham on secondary, 139; in relation to penal law, 225
- Eldon, Bentham's attack on, 145, 186
- Ellenborough, Lord, 160, 255, 265, 277, 290
- Encyclopædists, Beccaria becomes adherent of, 4; Voltaire and the, 9; Morellet in name of, invites Beccaria to Paris, 15; their criticism of penalties, 49, 50; influence abroad of, 87; *Correspondance littéraire* (1754-90), 88; Romilly not impressed by, 244
- Encyclopédie*, appearance of, 41; contributors to, 41
- Engel, apologist of torture, 34
- Equals, principle of judgment by, 75
- Equity and the Court of Chancery, Bentham's opinion of, 186
- Escheat, Bentham's proposals for extension of, 133; Romilly on, 309
- Esprit des lois*, influence of, on Beccaria's ideas, 40
- Evangelicalism in England, 156, 232
- Evidence, estimating value of, 76; "King's evidence," 77; antiquated rules of, in England, 167; Bentham on the law of, 187, 223; of the accused on his own behalf, 313
- Executions, public, in England, 172; Howard's condemnation of, 189; prohibited, 233; number of, in London, 290
- Exile, 315. *See also* Transportation
- Experimental method employed by Bentham, 194
- Fachinei, Angelo, charged to refute Beccaria, 13; his *Notes and Observations*, 13
- Farinaccius, treatise on criminal jurisprudence, 35; waning influence, 86
- Felony, counsel's aid in trial for, 234; pocket-picking a capital, 257
- Felton's case, 34
- Fénelon's influence on Bentham, 110
- Fictions, legal, 186, 230, 231
- Filangieri's *Science of Legislation*, 90
- Firmian, Count, protects Beccaria, 14; denunciation of torture, 90
- Flogging, in the army, 270; Romilly on, 310-11
- Fludyer, Sir Samuel, 239
- Forestalling and regrating, 233
- Forgiveness of injuries, Bentham on, 201
- Fortescue, 34
- Foscarini and the *Dei Delitti*, 13
- Fox, Charles James, resolution against the slave trade, 254
- Fragment on Government*, 117; its reception, 119
- Fragment on Style*, 8
- France, mode of conducting criminal trials in, 31; Beccaria's indebtedness to, 38, 54; penal legislation of, indebted to Beccaria, 83; criminal procedure of, reorganised, 96; Romilly's description of the people of, 245
- Franklin, Benjamin, 247
- Frederick the Great, abolition of torture by, 35; influence of French culture on, 87, 88
- Freehold estates and simple contract debts. *See* Assets
- French influences in Italy, 28
- French Revolution, influence of Beccaria on, 83; code of crimes and penalties during, 97; Bentham and, 125, 126; reactionary influence on English legislation, 160; Romilly's anonymous pamphlet on, 251
- Frisi, Paolo, influence of, over Beccaria, 5, 25
- "Frugality Banks," 134
- Fry, Elizabeth, 157
- Galiani, 29, 88
- Game laws in England, 164, 283
- Gaolers, exaction of fees by, 176
- Gay, John, relation of his teaching to Bentham's utilitarianism, 158
- Genovesi, Antonio, 21, 29, 87
- Gessale, 24
- Giannone, 29
- Gilbert's Act (1782), 133
- Godwin, on objects of government, 163

- Government, Bentham on the sphere of, 184
- Governors, cruelty of colonial, 276
- Graevius, J., 20, 33
- Grand Juries, 313
- Gravier, Jean, reprints the *Dei Delitti*, 12
- Gustavus III of Sweden, 87
- Habeas corpus suspension, 279
- Hanging in England, 172
- Happiness of the greatest number, the principle of the greatest, Beccaria and, 57; Bentham and, 115; Paley on, 157; Priestley on, 158; John Gay on, 158; relation of the, to Bentham's work in penal jurisprudence, 180; relation to theory of government, 185; Bentham's inconsistencies in application of the principle of, 228
- Hard Labour Bill, Bentham's pamphlet on, 120
- Hartley, David, 152
- Hellenic law, torture in, 32
- Helvétius, 17; Beccaria and, 38; contributor to the *Encyclopédie*, 41; as an utilitarian, 44; Bentham and, 115
- Heresy, punishment of, 203
- High treason, 65; capital punishment and, 94; bill to alter punishment, 273, 275, 308
- Holbach, Baron d', 17; contributor to the *Encyclopédie*, 41; teaching, 45
- Honour, English jurisprudence does not recognise, 221; the motive of, 225
- Horace, on the measure of punishments, 204
- Houses of correction, 173
- Howard, John, 127; his evidence on hulk system before Commons committee, 177; Romilly's interest in the work of, 243
- Hulks for convicts, 175, 315
- Humanitarianism in England, 156
- Hume, utilitarianism of, 152, 158
- Ideas, association of, Beccaria's penal system and the principle of the, 55
- Il Caffè*, 7
- Imprisonment, 210; with labour, 212; power to justices of the peace to award, 313-14
- "Indelible" punishments, 208
- Indemnity Bill, 282, 284
- Indirect means of legislation to combat crime, 219
- Infamy, 208. *See also* Opinion, public
- Infanticide, 67
- Injuries. *See* Offences
- Inquisition, the *Dei Delitti* and the, 13
- "Inspection House." *See* "Panopticon"
- Intention in crime, 59; Bentham on, 182
- Intestate succession, Bentham on, 133
- Intieri, Bartolomeo, 21
- "Irenaeus," 116
- Irish Insurrection Bill, Peel's, 276, 314
- Isimbardi, Countess, 20
- Italian society, characteristics of, in Beccaria's time, 29
- Italy, criminal law in and administration in, 30
- Jacobinism, Bentham and, 132, 160
- Jansenists, opposition to the *Encyclopédie*, 41
- Jesuits, opposition to the *Encyclopédie*, 41
- Johnson, Dr., advocates restriction of capital punishment, 188
- Joseph II of Austria, an admirer of Voltaire, 86. *See also* Austria
- Jousse, D., his criticism of Beccaria, 14, 86
- Jovellanos, 90
- "Judge and Co.," 119, 186
- "Judge-made" law, 186, 231
- Juries, their contempt for the penal code, 294
- Jurisdictions, conflicting or overlapping, 314
- Jury, trial by, in Scottish civil cases, 277
- Justices of the peace, summary conviction by, 313; who should be appointed, 318
- Kames, Lord, on the English penal system, 91
- Kant's criticism of Beccaria, 102
- Kaunitz, favours ecclesiastical reform, 30; disapproval of certain forms of torture, 93
- "King's evidence," 77
- Labour test for poor law relief, 134
- La Bruyère, 33
- Lacretelle, 96
- "Laissez faire," 162
- Lally's case, General, 51
- Lambertenghi, 6, 9
- Lansdowne, Marquess of, patronage of Bentham, 126, 161; Romilly meets, 248. *See also* Shelburne
- Lardizabal, 90
- Law, publication of, advocated by Bentham, 231; codification of, 231; fees in Chancery Court, 276; anti-quity of, as criterion of justice, 295-7, 310; promulgation of, 300
- Law's *Serious Call*, 283
- Lecky on Bentham's age, 153
- Legislation, Bentham's theory of, 185; indirect, to combat crime, 217, 219

- Lessing, 29
Lettres de cachet, 31, 74
Lettres persanes. See Persian letters
Lex talionis, 205
 Libel, Bentham on law of, 137, 219;
 Sidmouth's circular letter directing
 magistrates on the law of, 281;
 abuses of the law of, 203
 Licensing laws, 218
 Liddel, Mr., 239
 Lincoln prison, 270
 Linguet on Beccaria's views, 15
 Literary composition, Beccaria and, 8
 Locke, popularity in France of, 89;
 Bentham and, 115, 152
 Lombardy, reform of civil and criminal
 jurisprudence in, 22, 94
 London in the age of Bentham, 165
 "Lords' Act" for imprisoned debtors,
 176; extension of, to persons im-
 prisoned for not paying equity costs,
 261
 Lotteries, 280
 Lunatics, 233
 Macaulay, Zachary, 157
 Machiavelli, Beccaria's memory of, 25;
 and torture, 35
 Mackintosh, Sir James, opinion of, on
 Romilly's character, 325
 Madan, Martin, *Thoughts on Executive
 Justice* of, 91, 249, 287; biography of,
 249n.
 Madeleine, De la, 89
 Magna Carta, and the practice of
 torture, 34
 Malesherbes, 17, 250
 Malthus, Beccaria as forerunner of, 22
 Mangieri, his report on *Dei Delitti*, 11
 Mansfield, Lord, opinion of Beccaria of,
 90; Bentham's defence of, 116
 Marat and capital punishment, 89
 Maria Theresa, Blasco's appeal to, 4; a
 disciple of Voltaire, 87
 Marmontel, 17, 41; Bentham's trans-
 lation of his *Contes Moraux*, 118
 Marriages made civil contracts, 233;
 dissolution of, 233
 Martin, Henry, 157
 Meister, J. H., on Diderot, 43
 Mello Freire, 90
 Mercy, Madan's arguments against
 judicial, 289
 Metropolitan police, 133, 165, 278
 Milan, Beccaria's early life in, 5;
 statues of Beccaria in, 22; French
 influence on, 28
*Milan, On the Disorders and the Rem-
 edies of the Currency in, in the year
 1762*, 6
 Militia, embodiment of, 276
 Mill, James, a supporter of Bentham,
 141; on Bentham's style, 145
 Mill, John Stuart, on Bentham, 147,
 229, 232
 Millbank penitentiary replaces "Pan-
 opticon" system, 130
 Mirabeau, Bentham's acquaintance
 with, 125; his influence on Romilly,
 247
 Montaigne's condemnation of torture,
 33
 Montesquieu, his attitude towards
 torture, 33; on relativity of laws,
 40; contributor to the *Encyclopédie*,
 41; Bentham's objections to his
 doctrines, 190; Bentham's method
 superior to that of, 193
*Morals and Legislation, Introduction to
 the Principles of*, 122
 More, Hannah, 156, 157
 More, Sir Thomas, and torture, 34. See
 also *Utopia*
 Morellet, Abbé, 7, 15, 17; translates the
 Dei Delitti, 24
 Motives, Bentham's Table of, 182;
 classified, 197
 Municipal Corporations Act, 1835, 233
 Muyart de Vouglans, 10; his denuncia-
 tion of Beccaria, 14; apologist of
 torture, 34; influence of, destroyed, 86
 Nani, T., 90
 Naples, professorship of commerce
 founded in, 21; Beccaria and the
 king of, 23
 Natali, Marquis, on punishments, 90
 "Natural law," 231
 Necker, Beccaria and Madame, 17;
 on criminal procedure, 31; con-
 tributor to the *Encyclopédie*, 41
 Newgate Calendar, the, 239
 Newton, 89, 152
 Nicolas, Augustin, his dissertation on
 torture, 33, 33n.
 "Nolumus leges Angliæ mutari," 296
Note ed osservazioni, 13
 Notes and Observations. See *Note ed
 osservazioni*
 Oaths to prisoners, administration of,
 78; Bentham on, 140, 187
 O'Connell, Daniel, Bentham and, 142
 Odazzi, 9
 Offences, classified, 64; treason, 65;
 against the person, 65; affecting a
 man's honour, 65; against property,
 65; theft, 66; against public peace,
 67; suicide, 67; adultery, pederasty,
 infanticide, 67; capital, in England,
 170; Bentham's description and clas-
 sification of, 196; grounds of extenua-

- tion, 198; grounds of justification, 198; due to ignorance, infancy, insanity, intoxication, duress, 203; proportion between punishments and, 205; depravity of culprit only a circumstance of aggravation, 219; evil of, depends on consequences, 219; accessory, 223
- Offices, sale of public, 145
- Opinion, public, as a sanction, 68, 225
- Paley, Beccaria's influence on, 91; utilitarianism of, 157; as a reactionary in matters of penal reform, 160; Romilly's confutation of, 262; on the object of punishment, 287
- Pannomical Fragments*, Bentham's, 146
- "Panopticon" scheme, Bentham's, 120; conception of, 128; condemned, 130; Talleyrand and, 146; organisation of, 212; reformatory purpose of, 212
- Pardon, right of, 55, 62; abolished in France, 97; Fielding on abuse of, 189; where may be exercised, 203
- Parini, pours contempt on Beccaria, 12; influence of Voltaire on, 87
- Parliamentary reform, Bentham and, 137
- Parochial schools, 256
- Parr, Dr., on the death penalty, 263
- Pascal and the *Encyclopédie*, 42
- Pastoret, 89
- Peerage, privilege of, 234, 256
- Penal laws, reform of, an object of Beccaria's associates, 6; Burke on, 178; Romilly's efforts to mitigate severity of penal system, 179; Bentham's view and treatment of, 191; Romilly's motion on the, 262, 268; Romilly's indictment of the, 291; harshness of English, 296
- Penitentiaries, Bentham on, 120; Romilly on, 268; statutes relating to, 315
- Penn's penal code, 99
- Perceval, Romilly's friendship with, 323
- Periodical newspapers, Beccaria's article on, 8
- Perjury, subornation of, to prevent sentence of death, 215, 289, 293-4
- Persian Letters*, Montesquieu's, 4; Beccaria's admiration for, 38
- Peter Porcupine*, Bentham's letter on the census in, 135
- Philosophy, French, influence of, on Beccaria, 39
- Physiocrats, school of, 21
- Pillory, the, 208, 222, 233, 277
- Pitt, William, his interest in prison reform, 129; Bentham's constructive suggestion towards his *Poor Bill*, 134; his recognition of the necessity of prison reform, 177
- Pleasures of the Imagination*, Beccaria's, 8, 23
- Poaching, penalties for, 279
- Pocket-picking, Romilly's bill on, 257; death penalty and, 259, 278, 291, 295
- Police of the Metropolis*, Colquhoun's, 133, 165. See also Metropolitan police.
- Political Economy, Beccaria's lectures on, 21; Bentham's manual on, 184
- Political Tactics*, Bentham's treatise on, 125
- Pombal, law reforms of, 97
- Poor laws, Bentham's criticism of, 134, 233; Romilly and, 269
- Portugal, law reform in, 97
- Pozzuoli, Bishop of, charged with censorship of the *Dei Delitti*, 11
- Prescription, principle of, 63
- Prevention of crime, Beccaria on, 49, 80; means of, 198-9, 226; Romilly's division of punishments in relation to, 297; more important than punishment, 317; best means of, 318
- Price, Dr., and "laissez faire" doctrine, 162
- Priestley's *Essay on Government*, 115, 158
- Principles of Morals and Legislation*, Introduction to the. See *Morals and Legislation*, etc.
- Prison reform, Bentham and, 127; in England, 177; Romilly on, 319
- "Prisoners, Protector of," 6, 7
- Prisons in England in the age of Bentham, 173, 210
- Procedure, forms of, 223; reforms of, attributable to Bentham, 233
- Prohibitory laws, Bentham assails the, 124
- Promulgation of law, importance of, 300
- Proofs of crime, "perfect" and "imperfect," 75
- Prosecution, expenses of, 314
- Prussia, torture in, 35
- Psychology, Beccaria and the science of, 8; Bentham's errors of, 228
- Public utility, relationship of, to penalties, 49, 54
- Publius Syrus on torture, 33
- Punishment, purposes of, 49; Beccaria's theory of, 59; certainty of, 61, 300; deterrents, 61; place of, 62; infamy as a sanction, 68; banish-

- ment, 68; confiscation, 68; capital, 69; Bentham's theory of, 123; description of punishments that existed in England in the reign of George II, 171; when justifiable according to Bentham, 190; penal remedies, 198; satisfaction, compensation, and pecuniary reparation, 199, 200; defined, 202; vengeance in relation to, 202; chief end of, 202; reformatory or intimidating measures of, 202; cases unmeet for, 202; where pardoning power may be exercised, 203; rules as to the measure of, 204; qualities of, 205; kinds of, 207; "chronic," 208; imprisonment with labour, 212; impression of, on the imagination, 222; religion as a sanction, 225; disembowelling in punishment for treason, 273; military, 276; Paley on, 287; Romilly's classification of punishments, 297; judicial discretion in, 301; prerogative of changing, 309; corporal, 310
- Purchase of parliamentary seats made illegal, 273
- Quakers, evidence of, 167
- Queen's Square Place, Bentham's home in, 148
- Quesnay, contributor to the *Encyclopédie*, 41
- Quirini, Angelo, reforms of, 12
- Ramsay, Allan, letter of, on penal legislation, 15, 36
- Rationale of Punishments and Rewards*, 120
- Raynal, Abbé, contributor to the *Encyclopédie*, 41; doctrines of, 47; Romilly meets, 247
- Reform Act, 233
- Reform movement, 93
- Reformatory measures in relation to punishment, 202, 298
- Refuge, asylums of, 62
- Réfutation des principes hasardés dans le "Traité des délits et des peines,"* 14
- Registers of the population, 223
- Religion, Bentham on, 139; in relation to prevention of crime, 220, 221; as a sanction, 225
- Remedies, classified, 198
- Renazzi's *Elements of Criminal Law*, 90
- Reparation, pecuniary, 200, 314
- Reply, the. See *Risposta ad uno, etc.*
- Report, Minority, against Capital Punishment, 72
- Republican propaganda, effect on, of Bentham's writings, 126
- Retribution in relation to punishment, 287
- "Revolution Society," 161
- Rights of Man*, Paine's, 161; Bentham and, 183
- Riot Act, Bentham on the, 199
- Risi, P., work on criminal procedure, 90
- Risposta ad uno, etc.*, 14, 20
- Rochevoucauld, La, 278
- Röederer's translation of the *Dei Delitti*, 83
- Rollin's *Ancient History*, 283
- Romagnosi, criminologist, 21
- Roman law, torture in, 32
- Romilly, Sir Samuel, his efforts to mitigate severity of English penal system, 179; beauty of his character, 237; Birrell's tribute to, 237; his Huguenot descent, 237; his earliest education, 238; early impressions of gloom and melancholy, 238; studies the classics, 240; accession of fortune to his family, 240; articulated to a solicitor, 241; meets the Rev. John Roget, 241; enrolled at Gray's Inn, 242; devotion to literary exercises, 242; health impaired, 242; his life on the Continent, 244; called to the bar, 246; defence of Mirabeau, 247; early pamphlets on English penal system, 249; sympathy with French revolutionary party, 250; his marriage, 252; a leader of the Chancery bar, 252; his aversion from entering Parliament except through popular election, 253; becomes solicitor-general, 254; thoughts on the influence on England of the French Revolution, 259; speech on capital punishment, 263; his defence of Burdett's view that Parliament could not commit for publishing animadversions on its proceedings, 267; his Bristol election address, 271; elected for Arundel, 273; opposed to the slave trade, 276; his visit to Genoa, 277; his defence of religious liberty, 278; returned for Westminster, 283; death of his wife, 285; his suicide, 285; his career at the bar, 285; his peerage, 285; personal characteristics, 319 *et seq.*; his friendship with Bentham and with Perceval, 323; his magnanimity, 323; his defects, 331; his achievements, 331-2
- Rossi, 21
- Rousseau, deserts the *Encyclopédie*, 42; his teaching, 55; on capital punishment, 69; Romilly's enthusiasm for, 241
- Rousseaud de Lacombe, 86

- Russia, Empress of, invitation from, to Beccaria, 21; influence of Encyclopædists on, 88; abolishes the gallows and the wheel, 98
- "Sanctions," classification of, by Bentham, 182
- Satisfaction, in contradistinction to punishment, 199; kinds of, 200
- Saverio, Marquis, 3, 5
- Savonarola, 35
- Scarlett, James, his part in Romilly's attack on English legal and political institutions, 251
- Scotti, 72
- Secchi, 9
- Secret accusations, 74
- Sedition, capital punishment for, 73
- Seditious meetings, 262, 280
- Servan, advocate-general, Beccaria's influence on, 85; on harsh penal laws, 293
- Settlements, law of, 260
- Shaftesbury, popularity in France of, 89
- Shelburne's friendship with Bentham, 121
- Shoplifting Bill, Romilly's, 266, 273
- Sidmouth's circular letter to magistrates on the law of libels, 281
- Simancas, Bishop of Badajoz, apologist of torture, 34
- Simeon, 157
- Sirven, defence of, 9, 51
- Slave trade, 233, 254, 276, 278, 283
- Smith, William, 156
- Smuggling, 66
- Social Contract theory, relation of, to punishment, 55; Bentham assails, 183
- Solitary confinement, 317
- Sonnenfels, 89, 93
- Southey, his recantation of revolutionary principles, 162
- Spain, law reform in, 97
- Spectator*, Beccaria's tribute to, 39
- Spee, Friedrich von, and anti-witchcraft proceedings, 33
- Spinoza, 24; influence of, on Beccaria's work, 25
- Stanhope, Lord, 161, 267
- Stanislas of Poland, Voltaire and, 87
- Statistics, judicial, 315
- Stewart, Dugald, observations on death penalty, 263
- Suicide, 67
- Summary convictions, 313
- Sunday amusements, their relation to dangerous inclinations, 221
- Suspects, imprisonment of, 317
- Système de la Nature*, 46
- Tanucci, 87
- Taureau blanc*, Bentham's translation of, 116
- Taxes, Bentham's protest against law, 132
- Télémaque*, formative influences of, on Bentham, 110
- Teresa, Beccaria meets, 4; Beccaria's passion for, 16
- Thames Police Act, Bentham's assistance on the, 135
- Theft, 66, 266
- Théorie des peines et des récompenses*. See *Rationale of Punishments and Rewards*
- Thomasius, Christian, 33
- Tillot, du, 87
- Tooke, Horne, 163
- Torture, in Europe, 27, 30; condemnation of, by classical writers, 32; Boccaccio's disapproval, 33; Montaigne and, 33; Montesquieu and, 33; apologists of, 34; use in England, 34; use in Scotland, Ireland, France, Spain, Portugal, Germany, and Austria, 35; use in Netherlands, Denmark and Sweden, 36; criticised, 78; Verri on, 90; Kaunitz and, 93; total abrogation of, 94, 98
- Traité de législation civile et pénale*, 135
- Transportation of prisoners, 174, 176, 209, 265, 268, 269, 279, 316; Paley's condemnation of, 288; without benefit of clergy, 315
- Treason. See High treason
- Truth v. Ashurst*, Bentham's review entitled, 131
- Tucker, Abraham, Paley's indebtedness to, 158
- Turgot, 41
- Tuscany, adoption of Beccaria's principles in, 94
- Universal suffrage, 184
- Usury*, Bentham's *Defence of*, 123
- Utilitarianism, association of, with individualism, 154; relationship of, with Bentham's work in penal jurisprudence, 180, 193
- Utility, Beccaria's theory of, 58; Bentham's exposition of the principle of, 123; relation of principle of, to criminal law, 180; offences in relation to the principle of, 196; retributive justice and, 202; benevolence and the principle of, 224
- Utopia*, theories of punishment in More's, 308
- Vagrant soldiers and seamen, 269
- Vengeance in relation to penal remedies, 201, 202, 299

- Verri, Alessandro, 6; "Protector of Prisoners," 7; visits Paris, 16; estrangement with Beccaria, 19
- Verri, Pietro, 5; his influence over Beccaria, 5; part in production of Beccaria's *Dei delitti e delle pene*, 6; defence of Beccaria in answer to Fachinei, 14; abuses Beccaria, 20
- Vico, 29
- Vindiciae Gallicae*, 161
- Visconti, 9, 11
- Voltaire, 9; his *Commentary*, 10; denunciation of torture, 33; contributor to the *Encyclopédie*, 41; denunciation of existing criminal law, 51; list of works on criminal matters, 51*n.*; his letters to Beccaria, 85; attitude towards capital punishment, 86; his influence throughout Europe, 87; his criticism of Montesquieu, 194
- West Indies, slaves in, 283
- Westminster Review*, the, 143
- Whewell on Bentham, 231
- Whipping, 208, 222
- Wilberforce, sympathy of, with Bentham's prison reform, 129; supports Romilly's bills on penal reform, 265. *See also* Slave trade
- Wilkes, John, Romilly on, 248
- Wiseman, Sir R., 34, 34*n.*
- Witchcraft, 57*n.*, 203
- Wollstonecraft, Mary, 163
- Württemberg, Louis Eugene, Duke of, admiration of, for Beccaria, 11
- York, Duke of, Romilly and the charges against, 261, 325
- Young, Arthur, a supporter of the French Revolution, 162

